(2)
Supreme Court, U.S.
FILED
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No. 00-349

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG SCOTT DOUGALL, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY
and
THE COMMONWEALTH OF VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

JOHN P. MCGEEHAN
(Counsel of Record)
GEORGE A. HAWKINS
(On Brief)

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APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 5th *day of* June, 2000.

Record No. 000496
Circuit Court Nos. 178905, 178906,
178907 and 178908

Craig Scott Dougall, et al.,

Appellants,

against

The Rector and Visitors of
George Mason University,

Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk
By: /s/ Wendy L. Duck
Deputy Clerk

APPENDIX B

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 178908

KARL RODRIGUEZ, et al.,

Plaintiffs

VERSUS

THE RECTOR AND VISITORS OF
GEO. MASON UNIV., et al.,

Defendants.

ORDER

This case came before the Court on the 9th day of December 1999, for Defendants' Demurrer and Pleas to the Amended Motion for Judgment.

It is ORDERED as follows: Count I: The Demurrer on the basis of the Virginia Personnel Act preclusion is sustained. The Plea of sovereign immunity as it relates to the VPA is sustained. The issue of the Statute of Frauds is delayed until trial. All other demurrers and pleas are overruled.

ENTERED on _____, 199__.

Seen and excepted to:

/s/ John P. McGeehan
John P. McGeehan, Esq.
McGEEHAN & ASSOCIATES

(703) 273-5303
Bar No. #9160
COUNSEL FOR THE PLAINTIFF

/s/ Sidney E. Rab
Sidney E. Rab, Esq.
Asst. Attorney General
(804) 786-1109
Bar No. #15105
COUNSEL FOR THE DEFENDANT

Count II. The Court's rulings are the same as upon Count I. On the Motions To Strike, the motions are granted as to attorney's fees; otherwise they are denied – except the plea of misjoinder is overruled without prejudice.

Plaintiffs are granted 21 days leave to amend if so advised. If no amended pleading is filed this matter stands dismissed with prejudice.

Entered on 9 December 1999.

/s/ Leslie Alden
JUDGE

APPENDIX C

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 178907

LORI-ALLEN LOGAN, et al.,

Plaintiffs

VERSUS

THE RECTOR AND VISITORS OF
GEO. MASON UNIV., et al.,

Defendants.

ORDER

This case came before the Court on the 9th day of December 1999, for Defendants' Demurrer and Pleas to the Amended Motion for Judgment.

It is ORDERED as follows: Count I: The Demurrer on the basis of the Virginia Personnel Act preclusion is sustained. The Plea of sovereign immunity as it relates to the VPA is sustained. The issue of the Statute of Frauds is delayed until trial. All other demurrers and pleas are overruled.

ENTERED on _____, 199__.

Seen and excepted to:

/s/ John P. McGeehan
John P. McGeehan, Esq.
McGEEHAN & ASSOCIATES

(703) 273-5303
Bar No. #9160
COUNSEL FOR THE PLAINTIFF

/s/ Sidney E. Rab
Sidney E. Rab, Esq.
Asst. Attorney General
(804) 786-1109
Bar No. #15105
COUNSEL FOR THE DEFENDANT

Count II. The Court's rulings are the same as upon Count I. On the Motions To Strike, the motions are granted as to attorney's fees; otherwise they are denied – except the plea of misjoinder is overruled without prejudice.

Plaintiffs are granted 21 days leave to amend if so advised. If no amended pleading is filed this matter stands dismissed with prejudice.

Entered on 9 December 1999.

/s/ Leslie Alden
JUDGE

APPENDIX D

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 178906

AMBER THERESE FOSTER, et al.,

Plaintiffs

VERSUS

THE RECTOR AND VISITORS OF
GEO. MASON UNIV., et al.,

Defendants.

ORDER

This case came before the Court on the 9th day of December 1999, for Defendants' Demurrer and Pleas to the Amended Motion for Judgment.

It is ORDERED as follows: Count I: The Demurrer on the basis of the Virginia Personnel Act preclusion is sustained. The Plea of sovereign immunity as it relates to the VPA is sustained. The issue of the Statute of Frauds is delayed until trial. All other demurrers and pleas are overruled.

ENTERED on _____, 199__.

Seen and excepted to:

/s/ John P. McGeehan
John P. McGeehan, Esq.
McGEEHAN & ASSOCIATES

(703) 273-5303
Bar No. #9160
COUNSEL FOR THE PLAINTIFF

/s/ Sidney E. Rab
Sidney E. Rab, Esq.
Asst. Attorney General
(804) 786-1109
Bar No. #15105
COUNSEL FOR THE DEFENDANT

Count II. The Court's rulings are the same as upon Count I. On the Motions To Strike, the motions are granted as to attorney's fees; otherwise they are denied – except the plea of misjoinder is overruled without prejudice.

Plaintiffs are granted 21 days leave to amend if so advised. If no amended pleading is filed this matter stands dismissed with prejudice.

Entered on 9 December 1999.

/s/ Leslie Alden
JUDGE

APPENDIX E

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 178905

CRAIG SCOTT DOUGALL, et al.,

Plaintiffs

VERSUS

THE RECTOR AND VISITORS OF
GEO. MASON UNIV., et al.,

Defendants.

ORDER

This case came before the Court on the 9th day of December 1999, for Defendants' Demurrer and Pleas to the Amended Motion for Judgment.

It is ORDERED as follows: Count I: The Demurrer on the basis of the Virginia Personnel Act preclusion is sustained. The Plea of sovereign immunity as it relates to the VPA is sustained. The issue of the Statute of Frauds is delayed until trial. All other demurrers and pleas are overruled.

ENTERED on _____, 199__.

Seen and excepted to:

/s/ John P. McGeehan
John P. McGeehan, Esq.
McGEEHAN & ASSOCIATES

(703) 273-5303
Bar No. #9160
COUNSEL FOR THE PLAINTIFF

/s/ Sidney E. Rab
Sidney E. Rab, Esq.
Asst. Attorney General
(804) 786-1109
Bar No. #15105
COUNSEL FOR THE DEFENDANT

Count II. The Court's rulings are the same as upon Count I. On the Motions To Strike, the motions are granted as to attorney's fees; otherwise they are denied – except the plea of misjoinder is overruled without prejudice.

Plaintiffs are granted 21 days leave to amend if so advised. If no amended pleading is filed this matter stands dismissed with prejudice.

Entered on 9 December 1999.

/s/ Leslie Alden
JUDGE

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law/In Chancery No.:
L 178905
L 178906
L 178907
L 178908

Craig Scott Dougall, et al.,
Plaintiff/Complainant,

v.

The Rector and Visitors of George Mason University,
Defendant.

ORDER

This matter came to be heard on the 26th day of August, 1999 on the Plaintiff/Complainant/Defendant's Pleas of Sovereign Immunity, Statute of Frauds & Improper Joinder and Demurrer or Motion to Dismiss.

Upon the matters presented to the Court at the hearing, and for the reasons stated from the bench, it is hereby

ADJUDGED, ORDERED, and DECREED as follows:

1. The Court makes no ruling on Statute of Frauds, Virginia Personnel Act and misjoinder of parties.

2. The demurrer is sustained without leave to amend as to claims of interest and the demurrer is sustained with leave to amend as to the claim for punitive damages.

3. The Plea in Bar is granted and the cases dismissed as to Counts III and IV by virtue of sovereign immunity.

4. The demurrer is sustained as to Counts I and II with leave to amend for failure to allege compliance with V.C. § §2.1-223.1 and 8.01-192.

SEEN:

And Exceptions for reasons
stated in memorandums

/s/ John P. MeGeehan
Counsel for Plaintiffs/Complainant

SEEN:

/s/ Sidney E. Rab
Counsel for Defendant

Further ADJUDGED, ORDERED, and DECREED as follows:

5. Plaintiffs are granted twenty-one days to file its amended Motions for Judgment and Defendants shall respond within twenty-one days.

6. The evidentiary hearing set by Judge Smith for October 19, 1999 at 10:00 a.m. is removed.

Entered this 26th day of August, 1999.

/s/ David T. Stitt
Circuit Court Judge

SEEN: and Exception for reasons
stated in memorandums

/s/ John P. McGeehan
Counsel for Plaintiffs/Complainant

SEEN:

/s/ Sidney E. Rab
Counsel for Defendant

APPENDIX G

TRANSCRIPT OF PROCEEDINGS OF DECEMBER 9, 1999

VIRGINIA

IN THE CIRCUIT COURT
FOR THE COUNTY OF FAIRFAX

LAW No.: L178905

CRAIG SCOTT DOUGALL,
AND OTHER CURRENT POLICE
OFFICERS SIMILARLY SITUATED,

PLAINTIFFS

VS.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY,
AND
COMMONWEALTH OF VIRGINIA, ET AL.,

DEFENDANT.

THURSDAY, DECEMBER 9, 1999
FAIRFAX, VIRGINIA

THE ABOVE-ENTITLED CAUSE CAME ON TO BE HEARD IN THE CIRCUIT COURT OF FAIRFAX COUNTY, BEFORE THE HONORABLE JUDGE LESLIE M. ALDEN, JUDGE FOR THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA, IN COURTROOM

#5A, BEGINNING AT 10:00 A.M., WHERE THERE WERE PRESENT ON BEHALF OF THE RESPECTIVE PARTIES:

[2] COUNSEL FOR PLAINTIFF:

MCGEEHAN & ASSOCIATES
BY: JOHN MCGEEHAN, ESQUIRE
GEORGE A. HAWKINS, ESQUIRE
10615 JUDICIAL DRIVE
SUITE 403
FAIRFAX, VA 22030

COUNSEL FOR DEFENDANT:

OFFICE OF THE ATTORNEY GENERAL
BY: SYDNEY E. RAB, ESQUIRE
900 EAST MAIN STREET
RICHMOND, VIRGINIA 23219

* * *

[3] PROCEEDINGS

(THEREUPON, THE COURT REPORTER WAS SWORN.)

THE COURT: GOOD MORNING, EVERYONE. ALL RIGHT, THIS IS LAW 178905, 906, 907, AND 908, *CRAIG S. DOUGALL, ET AL. VERSUS GEORGE* MASON UNIVERSITY RECTORS, ET AL. *ARE THE* PARTIES READY TO PROCEED TODAY?

MR. RAB: WE ARE.

MR. MCGEEHAN: WE ARE, YOUR HONOR.

THE COURT: ALL RIGHT. ARE THERE ANY PRELIMINARY MATTERS?

MR. RAB: NO, YOUR HONOR.

MR. MCGEEHAN: NO.

THE COURT: ALL RIGHT, MR. RAB, THIS COMES ON THE DEFENDANT'S DEMURRER AND PLEA IN BAR.

MR. RAB: THANK YOU, YOUR HONOR. I'M SYDNEY RAB, ASSISTANT ATTORNEY GENERAL. I'M APPEARING TODAY FOR THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY AND AS WELL FOR THE COMMONWEALTH OF VIRGINIA.

LET ME INTRODUCE THE CASE BY GOING THROUGH SOME OF THE HISTORY. THIS IS THE SECOND ROUND IN A WAY OF DEMURRERS AND PLEADINGS. THE PLAINTIFFS INITIAL PLEADING, I THINK THE MOTION FOR JUDGMENT WAS MARCH 15, '99, WAS RESPONDED TO MAY 11, '99 WITH DEMURRERS, PLEAS [4] OF SOVEREIGN IMMUNITY AND THE CASE OF THE STATUTE OF FRAUD.

ON AUGUST THE 26TH, JUDGE DAVID STITT HEARD US AND AT THAT TIME HE STRUCK FROM THE ORIGINAL AMENDED MOTION FOR JUDGMENT THE COUNTS THREE AND FOUR AS THOSE

TWO COUNTS HAD TO DO WITH THE FEDERAL FAIR LABORS STANDARDS ACTS.

THE SUPREME COURT OF THE UNITED STATES IN THE INTERIM WHILE THIS LITIGATION WAS NEW ON JUNE 23RD OF 1999 ENTERED THE *ALDEN V. MAINE* DECISION INVOLVING PROBATION OFFICERS OF THE STATE OF MAINE AND INVOLVING THE SAME FAIR LABOR STANDARDS AT ISSUE. SO JUDGE STITT STRUCK FROM THE CASE COUNTS THREE AND FOUR. HE ALSO GRANTED THE DEFENDANT'S DEMURRER WITH RESPECT TO COUNTS ONE AND TWO AND HE GRANTED THEM ON THE LIMITED BASIS THAT AS A THRESHOLD MATTER, THE PLAINTIFFS HAVE NOT PLED COMPLIANCE WITH WHAT I CALL THE PECUNIARY CLAIMS STATUTE, WHICH IS AT 8.01-192 OF THE CODE OF VIRGINIA.

JUDGE STITT FELT THAT THE PLAINTIFFS HAD TO AT LEAST RE-PLEAD THAT. JUDGE STITT SPECIFICALLY SAYS IN HIS ORDER THAT HE RESERVES FOR FURTHER HEARING SUCH QUESTIONS OF THE STATUTE OF FRAUDS AND THE VIRGINIA PERSONNEL ACT, WHICH I'M GOING TO EMPHASIZE TODAY.

[5] NOW, WITH RESPECT TO THE STATUTE OF FRAUDS, LAST WEEK COUNSEL SPOKE AND WE DECIDED THAT ON THIS GROUP OF DEMURRERS AND PLEAS TO THE AMENDED MOTION FOR JUDGMENT THAT WE WOULD NOT PRESENT THAT TO THE COURT. THE DEFENDANT CONCEDES THAT THERE IS ENOUGH FACTIONAL MATTER IN DISPUTE THAT IT SHOULD NOT BE HEARD AS A PLEA, THAT WE WOULD PREFER TO RESERVE FOR THE TIME OF TRIAL FOR THE DEFENSE OF THE STATUTE OF FRAUDS.

SO TODAY IN RESPONDING TO THE AMENDED MOTION FOR JUDGMENT, THE POINTS THAT I WANT TO EMPHASIZE ARE THE VIRGINIA PERSONNEL ACT AND THE QUESTION OF THE ALLEGATIONS BEING SUFFICIENT OR NOT SUFFICIENT AS A MATTER OF LAW TO STATE A CLAIM OF BREACH OF CONTRACT AGAINST THE COMMONWEALTH. THERE ARE ALSO ISSUES OF JOINDER, ISSUES OF ATTORNEY'S FEES, MISCELLANEOUS MENTIONS OF THE FAIR LABOR STANDARDS ACT, SOME MENTIONING WHICH—OF COLLECTIVE BARGAINING AND SOMETHING ABOUT THE NOTICE OF THE AMOUNT OF THE CLAIM. BUT I THINK IF WE FIRST FOCUS ON THESE TWO KEY ISSUES, I THINK IT PUTS THE CASE IN A POSTURE WHICH, YOUR HONOR, COULD CONSIDER DISMISSING WITH PREJUDICE.

THESE ARE STATE WORKERS. THE PLAINTIFFS ARE EMPLOYED AS POLICE OFFICERS AT GEORGE MASON UNIVERSITY [6] AND THE VIRGINIA CODE ADDRESSES IT IN SEVERAL SECTIONS THE STATUS OF POLICE OFFICERS, AND SPECIFICALLY STATES THAT THEY ARE SUBJECT TO THE VIRGINIA PERSONNEL ACT. THE VIRGINIA PERSONNEL ACT AND THE STATUTE WHICH FOLLOWS IT CONCERNING THE DEPARTMENT OF EMPLOYEE RELATIONS COUNSELORS SETS FORTH A GRIEVANCE PROCEDURE. IT'S THE ADMINISTRATIVE PROCEDURE.

IT'S OUR POSITION, AND I THINK IT'S BEEN THE RULINGS OF THE VIRGINIA SUPREME COURT, THAT THIS GRIEVANCE PROCEDURE IS THE WAY IN WHICH STATE WORKERS WHO ARE CLASSIFIED AND COME UNDER IT ARE TO CHALLENCE DECI—

SIONS REGARDING THE CONDITIONS OF THEIR EMPLOYMENT.

SPECIFICALLY, THE SUPREME COURT OF VIRGINIA IN 1989, IN THE CASE OF *MURRAY VERSUS STOKES*, AT 237 VIRGINIA 653, A 1989 CASE, WAS CONSIDERED AN EMPLOYEE OF THE DEPARTMENT OF CORRECTIONS. THAT EMPLOYEE SOUGHT TO FILE IN THE COURTS A BILL OF COMPLAINT AGAINST THE DIRECTOR OF THE DEPARTMENT OF PERSONNEL OF TRAINING. HE WAS ALLEGING THAT THE RULINGS AND THE RULES PROMULGATED BY THE DEPARTMENT OF PERSONNEL AND TRAINING WERE IMPROPER AND THAT HE SHOULD HAVE BEEN OFFERED A FULL-TIME POSITION AS A SPECIAL INVESTIGATOR.

AND I'M GOING TO QUOTE AT SOME LENGTH WHAT THE [7] SUPREME COURT SAID ABOUT THE VIRGINIA PERSONNEL ACT. THE COURT SAID, THE GENERAL ASSEMBLY ENACTED THE VIRGINIA PERSONNEL ACT, VIRGINIA CODE 2.1-110, ET SEQ., ESTABLISHING THE PROCEDURE AND POLICIES APPLICABLE TO EMPLOYMENT WITHIN THE COMMONWEALTH, YET CREATES A DEPARTMENT OF PERSONNEL AND TRAINING AND REQUIRES THE GOVERNOR TO APPOINT A DIRECTOR. THE DIRECTOR HAS THE GENERAL AUTHORITY TO ADMINISTER THE ACT AND HAS VARIOUS SPECIFIC RESPONSIBILITIES ASSIGNED TO HIM BY STATUTE OR DELEGATED TO HIM BY THE GOVERNOR, CODE 2.1-113.

THIS COMPREHENSIVE LEGISLATION INCLUDES PROCEDURES FOR HIRING, PROMOTING, COMPENSATING, DISCHARGING, AND TRAINING STATE EMPLOYEES. IT ALSO PROVIDES FOR A GRIEVANCE PROCEDURE. THE ACT BALANCES

THE NEED FOR ORDERLY ADMINISTRATION OF STATE GOVERNMENT AND PERSONNEL PRACTICES WITH THE PRESERVATION OF THE EMPLOYEE'S ABILITY TO PROTEST HIS RIGHTS AND PURSUE LEGITIMATE GRIEVANCES.

THIS DUAL GOAL—THESE DUAL GOALS REFLECT A VALID GOVERNMENTAL INTEREST IN AND A RESPONSIBILITY TO ITS EMPLOYEES IN THE WORK PLACE. ADMINISTERING AN ORDERLY PERSONNEL SCHEME REQUIRES THE ABILITY TO PROMULGATE AND INTERPRET AND APPLY RULES IN A CONSISTENT [8] MANNER.

SO IN *MURRAY* THE COURT GIVES US THE FRAMEWORK WITHIN WHICH WE CAN ANSWER THIS QUESTION, WHAT DO STATE WORKERS DO WHEN THEY ARE AGGRIEVED? DO THEY COME INTO COURT AND SUE A STATE AGENCY OR DO THEY USE THE GRIEVANCE PROCEDURES?

THE OTHER CASE WHICH I WANT THE COURT TO CONSIDER IS THE *SCHOOL BOARD OF THE STATE OF NORFOLK VERSUS ANASTASIA M. GIANNOUTSOS*, THAT'S G-I-A-N-N-O-U-T-S-O-S. IT'S ALSO A 1989 CASE AND IT'S CITED AT 238 VIRGINIA 144. THAT CASE INVOLVED A TEACHER AND THE SCHOOL TEACHER CONSIDERED NORFOLK HAD RETURNED TO THE SCHOOL DISTRICT AND SHE WAS ON A TEMPORARY STATUS AND WHEN IT CAME TIME FOR HER TO RECEIVE THE STATUTORY NOTIFICATION FROM THE CITY AS TO WHETHER OR NOT HER CONTRACT WAS GOING TO BE RENEWED FOR THE FOLLOWING YEAR, SHE DIDN'T GET ANYTHING AT ALL.

UNDER THE STATUTE IT SAYS THE IMPLICATION OR THE RESULT OF A PUBLIC SCHOOL TEACHER NOT GETTING NOTICE THAT SHE IS NOT

BEING RENEWED IS THAT HER CONTRACT SHALL BE RENEWED FOR THE NEXT YEAR. WELL, WHAT HAPPENED IN THE CASE IS SHE WENT AHEAD AND SHE FILED SUIT AND THE TRAIL COURT AGREED WITH HER THAT SHE WAS ENTITLED TO HER [9] CONTRACTUAL RIGHTS AND HE AWARDED HER THE SUM OF TWENTY-FOUR THOUSAND EIGHT HUNDRED DOLLARS FOR HER CONTRACT AND ALSO JUDGMENT–I'M SORRY, HE AWARDED HER LESS THAN THE FULL YEAR, HE AWARDED HER JUDGMENT OF FIFTEEN THOUSAND TWO HUNDRED AND TWENTY DOLLARS AND FORTY CENTS WITH INTEREST AND THE SCHOOL BOARD APPEALED.

WHAT THE SCHOOL BOARD SAID TO THE SUPREME COURT IS THE STATUTE TELLS US WHAT THE IMPLICATIONS ARE OF THE CITY OF NORFOLK'S FAILURE TO GIVE HER NOTICE THAT IT WOULDN'T RENEW HER CONTRACT. THE STATUTE SAYS SHE GETS RENEWAL OF HER CONTRACT. IT DOESN'T SAY ANYTHING ABOUT DAMAGES. AND THE SUPREME COURT AGREED. THE SUPREME COURT SAID THAT WE HAVE A STATUTE WHICH CREATES A RIGHT TO NOTICE OF RENEWAL AND NO SUCH RIGHT EXISTS IN THE ABSENCE OF STATUTE. THE STATUTE ALSO PROVIDES A REMEDY FOR THE VIOLATION OF THAT RIGHT.

AND IN A PENULTIMATE PARAGRAPH THE SUPREME COURT SAYS, ONE OF THE BASIC PRINCIPLES OF STATUTORY CONSTRUCTION IS THAT WHERE A STATUTE CREATES A RIGHT AND PROVIDES A REMEDY FOR THE VINDICATION OF THAT RIGHT AND THAT REMEDY IS EXCLUSIVE UNLESS THE STATUTE SAYS OTHERWISE.

NOW, IF WE TAKE THESE TWO CASES, *MURRAY VERSUS* [10] *STOKES* AND *SCHOOL BOARD VERSUS GIANNOUTSOS*, THEY ANSWER OUR QUESTION ABOUT THESE STATE WORKERS. THESE STATE WORKERS HAVE A REMEDY, A GRIEVANCE REMEDY. THE MOTION–THE AMENDED MOTION FOR JUDGMENT ALLEGES THAT WHEN PLAINTIFF DOUGALL ASKED OF THE HUMAN RIGHTS–I'M SORRY, HUMAN RESOURCES PERSONNEL AT THE UNIVERSITY WHETHER HE COULD GRIEVE ABOUT HIS WAGES, HE WAS TOLD YOU CAN'T GRIEVE ABOUT YOUR WAGES. AND I WOULD–I WOULD CONCEDE THAT THE STATUTE WHICH SETS FORTH WHAT THINGS ARE GRIEVABLE IS A BIT DIFFICULT.

THE STATUTE SAYS ON THE ONE HAND THAT DISPUTES ABOUT WAGES WOULD NOT BE GRIEVABLE. ON THE OTHER HAND, THE STATUTE SAYS THAT YOU MAY GRIEVE THE FAILURE ON THE PART OF THE AGENCY TO FOLLOW THE POLICIES AND PROCEDURES OF THAT AGENCY OR OF THE STATE. I THINK IT'S DEBATABLE. I THINK IT'S OPEN. I THINK SOMEDAY THERE WILL BE A STATE WORKER, UNLIKE MR. DOUGALL, WHO WILL ACTUALLY FILE A GRIEVANCE OR ACTUALLY HAVE A HEARING OFFICER MAKE A DETERMINATION, AND WILL ACTUALLY HAVE THE RIGHT TO HAVE A CIRCUIT COURT REVIEW THE GRIEVABILITY ISSUE AND DECIDE WHETHER OR NOT A COMPLAINT THAT I HAVE NOT BEEN PAID WAGES UNDER THE FAIR LABOR STANDARDS ACT IS VIOLATION OF STATE POLICY IS GRIEVABLE.

[11] SOMEDAY THAT WILL BE DECIDED BY HEARING OFFICER OR A CIRCUIT COURT JUDGE, AND PERHAPS EVEN THE SUPREME COURT OF

VIRGINIA, BUT BECAUSE OF THE *SCHOOL BOARD VERSUS GIANNOUTSOS* I DON'T THINK THIS COURT HAS TO WORRY ABOUT THAT ISSUE. I DON'T THINK THIS COURT HAS TO DECIDE WHETHER OR NOT MR. DOUGALL ACTUALLY COULD HAVE THE SPECIFIC RELIEF THAT HE'S SEEKING. ALL THE COURT HAS TO DECIDE IS THE GENERAL ASSEMBLY HAS CREATED WHERE THERE WAS NONE A RIGHT IN STATE WORKERS TO MAKE CLAIM AGAINST THE STATE AND THE GENERAL ASSEMBLY IS PROVIDING A GRIEVANCE AND ADMINISTRATIVE PROCEDURE.

THE GENERAL ASSEMBLY TOOK INTO ACCOUNT SUCH THINGS AS THE COST TO THE TAXPAYERS, THE COST IN TIME TO ALL THE PARTIES CONCERNED, AND THE RIGHTS–RESPECTIVE RIGHTS AND PRIVILEGES OF THE STATE EMPLOYEES AND DID A BALANCING AND CREATED THIS GRIEVANCE PROCEDURE, SAID CERTAIN THINGS ARE GRIEVABLE AND CERTAIN AREN'T, AND THAT'S THE REMEDY.

THE COURT: SO IS IT–IS IT THE POSITION OF THE DEFENDANTS THAT THESE STATE EMPLOYEES SIMPLY HAVE NO AVENUE TO REDRESS A COMPLAINT THAT THEY'RE NOT BEING PAID FAIRLY OR PROPERLY OR IN ACCORDANCE WITH THEIR AGREEMENT?

MR. RAB: YOUR HONOR, IT'S THE POSITION OF THE [12] DEFENDANTS THAT THE EXCLUSIVE REMEDY FOR STATE WORKERS TO COMPLAIN ABOUT MATTERS INVOLVING THE PAY OF EMPLOYEES, IS EXACTLY WHAT THE STATUTE SAYS.

THE COURT: BUT IF THAT STATUTE EXEMPTS THESE KINDS OF ISSUES–

MR. RAB: THEN THERE IS NO OTHER REMEDY PRESENT WITH THE GENERAL ASSEMBLY AS CREATED. JUST LIKE THE CREATION OF THE REMEDY IN THE VIRGINIA'S FOR DISABILITIES ACT WAS HELD TO BE EXCLUSIVE IN THE *MANNELL* CASE, WHICH I THINK WAS JUDGE MERHIGE'S FEDERAL COURT DECISION. ITMAY NOT BE PERFECT, BUT IT'S THE ONLY REMEDY THAT'S BEEN CREATED.

THAT'S–JUST LIKE THE *GIANNOUTSOS* CASE AND SEVERAL OTHER CASES THAT ARE CITED IN MY BRIEF, WHERE THE REMEDY CREATED IS INCOMPLETE, IT IS NEVERTHELESS THE REMEDY. IT EXCLUDES ALL OTHERS IT PRECLUDES. AND, YES, THAT'S OUR POSITION.

THE COURT: ALL RIGHT.

MR. RAB: THE OTHER LARGE ISSUE ABOUT THIS BILL–THIS AMENDED MOTION FOR JUDGMENT IS WHAT IT IS ATTEMPTING TO DO TO THE LAW OF CONTRACTS. IT'S BASIC TO THE LAW OF CONTRACTS THAT THE PARTY WHO WOULD INVOKE THE COURT WOULD SAY THERE HAS BEEN A PROMISE MADE AND THAT [13] PROMISE HAS BEEN BROKEN, AND I WAS DAMAGED AS A RESULT OF THAT PROMISE BEING BROKEN. BUT THAT'S NOT WHAT MR. DOUGALL AND HIS FELLOW EMPLOYEES HAVE SAID.

RIGHT IN THE AMENDED MOTION FOR JUDGMENT THEY SPEAK OF A PROMISE TO PAY A SALARY, TO PAY TWICE A MONTH, AND THEY SAY AND TO PAY OVERTIME FOR WORK IN EXCESS OF FORTY OR EIGHTY HOURS. THEY DON'T ALLEGE A COMPREHENSIVE WRITTEN CONTRACT. THEY MAY BE CONSTRUED–THE COURT MAY

DRAW TOGETHER THAT THIS CONTRACT IS AN AMOUNT OF WRITINGS AND ORAL PROMISES, BUT THEY HAVE ALLEGED A PROMISE TO BE PAID OVERTIME. I'LL CONCEDE THAT.

THEN WHEN THEY GET DOWN IN PARAGRAPHS, I THINK IT'S FIVE, SIX, SEVEN, AND EIGHT, THEY BEGIN TO ALLEGE A SERIES OF BREACHES. THEY SAY THAT THERE HAS BEEN A BREACH BECAUSE THE STATE HAS NOT PAID THEM FOR ROLL CALL, HAS NOT PAID THEM FOR THE TIME THEY SPENT AT HOME DOING THE WORK, HAS NOT PAID THEM FOR CERTAIN THINGS THEY DO BEFORE THEY COME ON SHIFT, OR FOR CERTAIN TRAINING TIME OR FOR MEALS, OR FOR TRAVEL ACTIVITIES. SO THEY HAVE A LIST AND THE AMENDED MOTION FOR JUDGMENT DETAILS THESE THINGS AND THEY SAY THAT THE UNIVERSITY DIDN'T PAY THEM FOR THESE THINGS.

THE PROBLEM IS THEY DON'T ALLEGE THAT THE [14] UNIVERSITY EVER PROMISED TO PAY THEM FOR THESE THINGS. AS A MATTER OF FACT, IN FIVE, SIX, SEVEN, AND EIGHT THE OFFICERS SPECIFICALLY ALLEGE THAT GMU DID NOT—WAS NOT WILLING, DID NOT AFFORD THEM PAY FOR THESE THINGS. THE INCONSISTENCY IN ALLEGING A BREACH OF CONTRACT WHICH REQUIRES A MEETING OF THE MINDS AND THEN ALLEGING THE DEFENDANT DID NOT AGREE TO PAYMENT FOR THIS TRAVEL, THIS TRAINING, THIS PRE-SHIFT WORK, THIS ROLL CALL, DID NOT AGREE TO PAY ME AND THEN SUING THE DEFENDANT FOR NOT PAYING IS APPARENT IN ITS INCONSISTENCY; IT'S APPARENT. BUT I THINK I CAN RESOLVE WHY WE HAVE THIS STATUS IN THE PLEADING.

THESE OFFICERS WANT WHAT THEY CONSTRUE THE FAIR LABOR STANDARDS ACT TO PROMISE THEM. THE FAIR LABOR STANDARDS ACT, THE FEDERAL LAW THAT HAS BEEN EFFECT FOR FIFTY-SOME YEARS, INCLUDES PROVISIONS DEFINING WORK WHICH IS NECESSARY AND INCLUSIVE AND PART OF THE PRINCIPLE ACTIVITIES. IF AN EMPLOYEE IS DOING SOMETHING WHICH IS PART OF HIS PRINCIPLE ACTIVITIES, THE FLSA WOULD SAY HE SHOULD BE PAID FOR THAT TOO. ON THE OTHER HAND, MERE COMMUTING, FOR EXAMPLE, WHICH IS NOT PART OF ONE'S PRINCIPLE ACTIVITIES, IS NOT CONSIDERED COMPENSABLE. IT MAY BE THAT BECAUSE AN OFFICER IS HARRIED BY VISITORS [15] DURING HIS MEAL PERIOD AND HE ABSOLUTELY DOES NOT GET A CHANCE TO BITE HIS SANDWICH WITHOUT SOMEONE BREATHING DOWN HIS NECK, IT MAY BE THAT THAT MEAL PERIOD SHOULD BE COMPENSABLE.

ON THE OTHER HAND, IF IT IS A THIRTY-MINUTE MEAL PERIOD IN WHICH HE'S FREE TO GO TO MCDONALD'S OR ARBY'S OR SOME PLACE OFF CAMPUS, OR HE REALLY HAS A CHOICE AND OPPORTUNITY TO HAVE A FREE THRITY-MINUTE PERIOD, PERHAPS HE JUST LIKES THE SOCIAL ASPECTS OF BEING ON CAMPUS AND PERHAPS BEING BOTHERED. AS LONG AS THE UNIVERSITY IS AFFORDING HIM THE THIRTY-MINUTE PERIOD IN WHICH HE COULD LEAVE CAMPUS, THEN THE MEAL PERIOD IS NOT WORK.

SO THERE ARE LINES DRAWN BY THE FAIR LABOR STANDARDS ACT. AND I THINK WHAT WE HAVE HERE, IS WE HAVE A LAW-

SUIT ORIGINALLY DRAFTED WHEN GEORGE MASON AND THE STATE WERE AMENABLE TO LAWSUITS BY STATE WORKERS FOR VIOLATIONS OF THE FAIR LABOR STANDARDS ACT. SO YOU HAVE A PLEADING WHICH SAYS YOU DIDN'T DO THE KINDS OF THINGS IN TERMS OF GIVING US PAY FOR THIS TRAVEL TIME, THIS ROLL CALL, THIS PRE-SHIFT, THAT THE FAIR LABOR STANDARDS ACT CONTEMPLATES WE BE PAID FOR. IT SAYS YOU NEVER—IT ACKNOWLEDGES YOU NEVER PROMISED TO DO THIS.

[16] NOW THAT WE HAVE SEVERED LAW, THE SUPREME COURT'S DECISION AND THE LAW OF THIS CASE, NOW THAT WE HAVE A DECISION, THAT THE STATE MAY NOT BE COMPELLED TO MEET FLSA STANDARDS IN A STATE COURT PROCEEDING BECAUSE THE STATE'S SOVEREIGN IMMUNITY IS AFFRONTED BY BEING SUED BY VIRTUE OF THIS ACT OF CONGRESS, CONGRESS DID NOT EMPOWER TO ABROGATE STATE SOVEREIGN IMMUNITY.

NOW THAT WE HAVE THIS RULING THE STATE CANNOT BE HAULED INTO COURT ON COMPLAINTS ABOUT FAIR LABOR STANDARDS ACT COMPLIANCE, THEN WE HAVE TO LOOK AT THIS BREACH OF CONTRACT CLAIM THAT WAY. THEY WOULD HAVE TO HAVE A MEETING OF THE MINDS AND AGREEMENT. THEY WOULD HAVE TO SAY THAT THE PERSONNEL OFFICERS AT GEORGE MASON UNIVERSITY THAT WE—THAT WE SHOULD BE PAID FOR PRE-SHIFT, FOR ROLL CALL, FOR WORK WE DO AT HOME AND THEY BREACHED THAT PROMISE. ASSUMING THEY GET OVER ALL THE OTHER HURDLES

ABOUT LAWSUITS BETWEEN STATE WORKERS AND THE STATE AND WE GET TO SUBSTANTIVE CONTRACT LAW, THEY WOULD HAVE TO PLEAD A MEETING OF THE MINDS AND THEY DID THE OPPOSITE. THEY SAID THERE WASN'T A MEETING OF THE MINDS. GMU NEVER AGREED TO DO IT. SO ON THAT BASIS WE FIND, AND WE SUGGEST TO THE COURT, THAT THE AMENDED BILL OF COMPLAINT IS DEMURRABLE.

[17] NOW, I HAVEN'T SPOKEN VERY MUCH ABOUT THE SECOND COUNT. I FIND THE SECOND COUNT VERY DIFFICULT TO READ AND UNDERSTAND. I THINK THAT COUNSEL IN WRITING HIS MEMORANDUM CONCERNING THE SECOND COUNT STATES. I THINK THAT IN FAIRNESS THE SECOND COUNT IS EXPLAINED IN THE NINETEENTH PARAGRAPH AND I LEAVE IT TO THE COURT TO READ THE NINETEENTH PARAGRAPH. BUT I DON'T BELIEVE THAT IN THE NINETEENTH PARAGRAPH OR ANY OF THE SUBSEQUENT PARAGRAPHS THERE IS AN ALLEGATION THAT AT A PARTICULAR POINT IN TIME, A PARTICULAR PROMISE TO PAY TWENTY-FIVE DOLLARS PER HOUR WAS MADE WITH RESPECT TO A PARTICULAR TASK.

I DON'T BELIEVE THERE'S AN ALLEGATION THAT THAT WAS BROKEN WITH RESPECT TO A PERIOD OF TIME, WITH RESPECT TO A PARTICULAR JOB THAT WAS DONE, AND RESULTING DAMAGES. I THINK THERE'S MERELY AN ALLEGATION THAT GMU TOLD THE PLAINTIFF AND OTHER POLICE OFFICERS THAT FOR A SEPARATE AND INDEPENDENT EMPLOYMENT THEY ARE TO BE PAID TWENTY-FIVE DOLLARS AN HOUR.

WELL, THIS–THIS REALLY ISN'T ENOUGH. AND I'M NOT SURE THAT THIS IS WITHIN THE PERIOD OF LIMITATIONS, THIS AGREEMENT THAT THEY'RE TALKING ABOUT, AND I'M NOT SURE HOW IT WAS BREACHED, AND I'M NOT SURE [18]WHAT EACH PLAINTIFF CLAIMS IN TERMS OF BREACH OF THAT AGREEMENT. SO ON THAT BASIS I THINK COUNT TWO FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

I FIND THE JOINDER OF THESE PLAINTIFFS ALSO TO BE PUZZLING. WE RECOGNIZE THAT THE FAIR LABOR STANDARDS ACT, THE FEDERAL STATUTE, HAVE PROVIDED FOR A KIND OF GROUPING OR CLASS ACTION AND THAT WHEN THIS SUIT WAS ORIGINALLY FILED A LARGE GROUP WAS ASSEMBLED AND THEY GAVE THEIR CONSENTS AND THEY FILED TOGETHER. WE OBJECTED TO JOINDER THEN AND WE OBJECT TO JOINDER ESPECIALLY NOW.

VIRGINIA–VIRGINIA DOES NOT RECOGNIZE THE RIGHT OF A GROUP OF PLAINTIFFS EACH AND EVERY ONE OF THEM CLAIMING A CONTRACT WITH DIFFERENT DAMAGES AND DIFFERENT TIMES THAT THEY WORKED TO SUE TOGETHER. I HAVE SUGGESTED THAT IF THEY ARE CLAIMING THAT THEY ARE ALL UNDER ONE CONTRACT, THEN WE HAVE A PROBLEM BECAUSE THE STATE HAS NEVER ENGAGED IN COLLECTIVE BARGAINING, THE STATE IS PRECLUDED FROM ENGAGING IN COLLECTIVE BARGAINING AND THERE COULDN'T BE ONE CONTRACT. SO EITHER THEY HAVE A SERIES OF SEPARATE CONTRACTS AND THEY DON'T BELONG IN COURT CONSOLIDATED IN ONE

CIVIL ACTION, AS VIRGINIA DOES NOT RECOGNIZE PLAINTIFFS JOINING INDEPENDENT CLAIMS, OR THERE'S SOME KIND OF A COLLECTIVE BARGAINING AGREEMENT [19] COVERING THEM ALL WHICH I DON'T SEE HOW THE STATE COULD HAVE MADE ITSELF BOUND BY THAT BECAUSE IT'S PRECLUDED BY STATE LAW FOR THEM TO ENGAGE IN COLLECTIVE BARGAINING.

ALSO, THERE IS NO RECITATION AS TO THE DAMAGE THAT THE INDIVIDUAL PLAINTIFFS BEYOND SAYING IT'S ABOUT FIFTEEN THOUSAND DOLLARS OR IT'S IN EXCESS OF FIFTEEN THOUSAND DOLLARS. THE PLAINTIFFS HAVE NOT SUPPLIED THE DEFENDANT WITH ANYTHING WHICH YOU WOULD ORDINARILY SEE IN BREACH OF A CONTRACT. THAT IS A MONETARY AMOUNT. I BELIEVE EVEN THIS COURT FIXES THE FILING FEES FOR LAWSUITS BASED UPON THE AMOUNT AT ISSUE. AND IF THE AMOUNT AT ISSUE IS A FULL FIFTEEN THOUSAND DOLLARS WE SHOULD BE TOLD. IF IT'S TWENTY THOUSAND DOLLARS, IF IT'S THIRTY THOUSAND DOLLARS, WE SHOULD BE TOLD SO THAT THE STATE CAN RESPOND RESPONSIBLY IN TERMS OF ALLOCATING THE RESOURCES TO MEET THIS COMPLAINT.

THE COURT: IS YOUR ARGUMENT THAT THE DEFENDANT DOESN'T KNOW WHETHER THE AD DAMNUM IS FIFTEEN THOUSAND FOR ALL OF THESE PLAINTIFFS OR FIFTEEN THOUSAND PER PLAINTIFF OR–

MR. RAB: I THINK THAT IT READS THAT THEY–IT IS AT LEAST FIFTEEN THOUSAND DOLLARS FOR EACH, BUT THE FIFTEEN THOU-

SAND DOLLARS IS ONE AMOUNT AND A HUNDRED [20] THOUSAND IS ANOTHER AMOUNT, AND PLAINTIFFS IN A CIVIL LAWSUIT IN VIRGINIA ARE USUALLY EXPECTED TO EXPRESS IN AN AD DAMNUM AN AMOUNT.

I SHOULD FLIP BACK TO THE LANGUAGE. IT SAYS, FOR DAMAGES IN EXCESS OF FIFTEEN THOUSAND DOLLARS. IT SAYS PLAINTIFF, IT DOESN'T SAY PLAINTIFFS. THERE ARE TWO COUNTS. IT'S LEFT IN A WAY THAT WE DON'T KNOW WHAT WE'RE DEFENDING. WE KNOW THERE ARE LOTS OF PLAINTIFFS. THEY'RE ALL ON THE SAME LAWSUIT AND WE DON'T KNOW WHAT THEY'RE INDIVIDUALLY CLAIMING.

DOES YOUR HONOR HAVE ANYTHING FURTHER QUESTIONS?

THE COURT: NO, NOT AT THE MOMENT, MR. RAB.

MR. RAB: THANK YOU.

THE COURT: THANK YOU.

MR. MCGEEHAN: GOOD MORNING, YOUR HONOR.

THE COURT: GOOD MORNING, MR. MCGEEHAN.

MR. MCGEEHAN: I'M JOHN MCGEEHAN AND I AM REPRESENTING THE PLAINTIFFS IN THESE FOUR LAWSUITS.

THE COURT: WHY—WHY ARE THESE LAWSUITS DIVIDED UP THE WAY THEY ARE?

MR. MCGEEHAN: BECAUSE ACTUALLY WE'VE BROKEN—THE CLASS OF INDIVIDUALS, IF I MAY USE THAT WORD CLASS, I [21] DON'T WANT TO GET MYSELF INTO A CLASS ACTION, I'LL ADDRESS THAT ISSUE LATER AS TO WHY

THEY'RE SUING IN THAT CAPACITY, BUT THERE ARE FOUR–FOUR DIFFERENT RELATION–STATUS TO THE PLAINTIFFS AND THE UNIVERSITY. ONE ARE CURRENT POLICE OFFICERS; TWO IS FORMER POLICE OFFICERS; THREE IS CURRENT DISPATCHERS; AND FOUR ARE FORMER DISPATCHERS. AND GIVEN WHETHER OR NOT THEY ARE PRESENT OR FORMER EMPLOYEES IS THE NATURE OF THE RELATIONSHIP AT THE TIME THE SUIT WAS FILED CHANGED AND THERE IS ALSO A DIFFERENCE.

WHEN WE FILED THIS LAWSUIT, AS MR. RAB DID CORRECTLY SAY, THERE WAS NO RECOGNIZED IMMUNITY TO THE STATES FOR THE FAIR LABOR STANDARDS ACT. HOWEVER, UNDER THE FAIR LABOR STANDARDS ACT THERE IS A DIFFERENT WAY OF TREATING LAW ENFORCEMENT AND PUBLIC SAFETY OFFICERS AND THE DISPATCHERS DID NOT FIT WITHIN THAT CATEGORY; THEREFORE, IF AT THE TIME WE FILED THE LAWSUIT, THE FAIR LABOR STANDARDS ACT CLAIM WE WERE TO HAVE GONE FORWARD, THE RULES APPLICABLE UNDER THE FAIR LABOR STANDARDS ACT DIFFERED DEPENDING ON WHETHER THEY WERE DISPATCHERS OR POLICE OFFICERS. MAY I PROCEED?

THE COURT: GO AHEAD.

MR. MCGEEHAN: THANK YOU, YOUR HONOR. YOUR [22] HONOR, WHAT THIS CASE HAS LARGELY INVOLVED RIGHT NOW BEFORE THE COURT IS WHETHER OR NOT–IS A QUESTION OF PLEADING, NOT A QUESTION OF MERIT, IF I MAY SAY. AND, OF COURSE, WE DO BELIEVE THAT THE CASE DOES HAVE MERIT.

THE QUESTION BEFORE THE COURT TODAY WAS LARGELY ON DEMURRER AND ONE INSTANCE OF PLEA WHETHER OR NOT THE CASE HAS BEEN CORRECTLY PLED. NOW, MR. RAB MADE–I HAVE FIVE ARGUMENTS. HIS ARGUMENTS ARE, ONE, WHETHER OR NOT THE VIRGINIA LAW AS GOVERNING STATE EMPLOYEES, THE VIRGINIA PERSONNEL ACT, AND THEN THE DERC STATUTE. THE DERC STATUTE IS CHAPTER TEN POINT ZERO ONE. I HAVE THE ONE FROM 1995, WHAT HAPPENED WAS THEY CREATED THAT SEPARATE CHAPTER AND IT NO LONGER IS CALLED THE VIRGINIA PERSONNEL ACT, BUT IT SPLIT IF OFF, SO I'M GOING TO REFER TO THAT AS THE DERC CHAPTER. AND MR. RAB AND I ARE TALKING ABOUT THE SAME THING.

HIS SECOND ARGUMENT IS WHETHER OR NOT WE HAVE PROBABLY PLED CONTRACT. HIS THIRD ARGUMENT IS WHETHER WE HAVE PROPERLY ALLEGED IN COUNT TWO HOW THE CONTRACT WAS BREACHED. THE FOURTH ARGUMENT IS WHETHER OR NOT THERE IS JOINDER, AND IF THERE'S NOT A JOINDER, IF THIS ACT CONSTITUTES COLLECTIVE BARGAINING IN VIOLATION OF PUBLIC POLICY. AND THE FIFTH ARGUMENT IS THAT WE HAVE NOT [23] RECITED DAMAGES WITH ANY GREATER PRECISION THAN AT LEAST FIFTEEN THOUSAND DOLLARS.

GOING BACK FIRST OF ALL TO THE EXCLUSIVENESS OF THE REMEDY OF THE VIRGINIA PERSONNEL ACT. AS MR. RAB HAS CONCEDED, THE VIRGINIA PERSONNEL ACT DOES NOT EXPLICITLY ADDRESS THIS ISSUE. HOWEVER, I DO WISH TO REMIND THE COURT THAT WE HAVE PLED

IN PARAGRAPH TWENTY-ONE THAT THE OFFICERS DID GO TO THEIR SUPERVISORS. THEY DID GO TO THE HUMAN RESOURCE PERSON WHOM THEY WERE TOLD WAS IN CHARGE OF WAGE AND HOUR ISSUES AND THEY WERE TOLD BY THAT PERSON THAT THIS IS NOT A GRIEVABLE ISSUE. NOW, AS SUCH, THAT CERTAINLY WOULD–WOULD RAISE AN ISSUE OF ISSUE CONCLUSION IF IN FACT THEY DIDN'T PURSUE THAT.

THE SECOND POINT I WISH TO RAISE IS THAT WHEN MR. RAB TELLS YOU THEY HAVE A REMEDY, HE MEANS A THEORETICAL REMEDY, BECAUSE UNDER–IF IN FACT THIS WERE GRIEVABLE, THEY HAD TO FILE THE GRIEVANCE WITHIN THIRTY DAYS OF THE GRIEVABLE ACT. THIS COVERS A LONG PERIOD OF TIME ENCOMPASSING THE TIME WHEN THEY WERE TOLD IT WAS NOT GRIEVABLE. AND I DARE SAY THAT IF WE TRIED TO FILE A GRIEVANCE AT THIS POINT, WE'D NOW BE TOLD THIRTY DAYS WAS APPLICABLE AND WE NO LONGER WERE ABLE TO GRIEVE IT.

THIRD IS IN HIS CITING OF THE CASE OF *MURRAY* [24] *VERSUS STOKES*, HE'S RELYING ON DICTA. WHAT *MURRAY VERSUS STOKES* SIMPLY HOLDS IS THAT WHEN THE DIRECTOR OF THE DEPARTMENT OF PERSONNEL AND TRAINING MAKES AN INTERPRETATION OF POLICY THAT THAT IS NOT REVIEWABLE BY THE COURT. THE LANGUAGE CITED BY MR. RAB IS NOT THE HOLDING OF THE CASE. IN FACT THERE IS NO HOLDING IN–THAT TRULY COVERS THIS ISSUE, BUT I TURN THE COURTS ATTENTION TO SECTION 2.1-116.06 OF THE CODE, SPECIFICALLY PARAGRAPH THREE.

NOW—AND ITS OUR CONTENTION THIS SAYS THAT THIS IS NOT A GRIEVABLE ISSUE. NOW, GOING BACK TO THE WRITTEN ARGUMENT OF THE STATE IN THIS CASE, THEY SAY THAT WHEN THE GOVERNOR AND THE LEGISLATURE TRY TO MAKE THE DETERMINE—TO MAKE THE DETERMINATION, IT'S NOT FOR THE COURT TO OVERRIDE THAT DETERMINATION. AND I SUBMIT THE COROLLARY OF THAT ARGUMENT IS IF THEY HAVE MADE A DETERMINATION THAT SOMETHING IS NOT GRIEVABLE, THEN IT IS NOT FOR THE ATTORNEY GENERAL'S OFFICE TO ASSERT THE CONTRARY TO THE GOVERNOR AND THE LEGISLATURE. BUT PARAGRAPH THREE SAYS, CLAIMS RELATING SOLELY TO THE FOLLOWING ISSUES SHALL NOT PROCEED TO A HEARING—

THE COURT: NOW WHICH—WHICH SECTION ARE YOU REFERRING TO NOW?

[25] MR. MCGEEHAN: SECTION 2.1-116.06 SUBPARAGRAPH C. IT'S IN THE SUPPLEMENTAL PART ON PAGE 109. THIS PART HAS NOT BEEN AMENDED, BUT THAT SECTION HAS BEEN AMENDED SO IT'S IN THE SUPPLEMENT'

THE COURT: GO ON.

MR. MCGEEHAN: WHAT IT STATES IS CLAIMS RELATING SOLELY TO THE FOLLOWING ISSUES SHALL NOT PROCEED TO A HEARING. ESTABLISHMENT AND REVISION OF WAGES, SALARY, POSITION CLASSIFICATIONS, OR GENERAL BENEFITS. AND SO WHAT IT STATES IS THAT NOT ONLY IS IT NOT SUBJECT TO A HEARING, IT'S NOT EVEN GRIEVABLE IF IT RELATES TO THE ESTABLISHMENT OF WAGES AND THAT'S WHAT THIS LAWSUIT IS ABOUT.

WHEN YOU HEAR THE ARGUMENTS, YOUR HONOR, WHAT THE ARGUMENT BETWEEN THESE PARTIES ARE, THAT YOU ENTERED INTO A CONTRACT FOR EMPLOYMENT, PART OF THAT CONTRACT OF EMPLOYMENT WAS YOU WOULD PAY US, ONE, OVERTIME AND, TWO, YOU WOULD PAY US TWENTY-FIVE DOLLARS AN HOUR FOR OUTSIDE EMPLOYMENT. THE ARGUMENT BY THE PLAINTIFFS IS THAT YOU DIDN'T PAY US. THE STATE, THUS FAR, HASN'T TAKEN A POSITION OF, YEAH, WE PAID YOU OR NO, WE DIDN'T PAY YOU. BUT IMPLICIT IS YOU CAN'T DO ANYTHING ABOUT IT.

SO THE ISSUE IS WHETHER OR NOT THE [26] ESTABLISHMENT AND REVISION OF WAGES AS OVERTIME OR WAGES OR BENEFITS AS TO THE OUTSIDE EMPLOYMENT. AND WHAT C SAYS IS THAT IS NOT GRIEVABLE, THAT IS NOT SUBJECT TO A HEARING—A GRIEVANCE HEARING ITSELF AND LASTLY I GO BACK AND RECAPTURE THE POINT THAT IF INDEED THE PLAINTIFFS WERE TO ASSERT THE RIGHT AT THIS POINT, AFTER HAVING BEEN TOLD THEY DIDN'T HAVE THE RIGHT, THEY WOULD BE TOLD THEY'RE TOO LATE BY SEVERAL YEARS BECAUSE IT'S A THIRTY-DAY GRIEVANCE ISSUE. AND I THINK IN THAT ARGUMENT WE HEAR THE SAME ARGUMENT FROM MR. RAB WHICH IS THE SANCTITY OF THE STATUTE HAS TO BE ABIDED BY AND IT'S A THIRTY-DAY GRIEVANCE PERIOD.

THE COURT: WELL, HIS POSITION IS, THOUGH, AS I UNDERSTAND IT, THOUGH, THAT THIS IS JUST SOMETHING THAT A STATE EMPLOYEE CAN'T COMPLAIN ABOUT.

MR. MCGEEHAN: I HEARD YOUR QUESTION ON THAT.

THE COURT: THEN–

MR. MCGEEHAN: WHAT I WOULD–WHAT I WOULD TURN BACK ALMOST TO THE QUESTION, I THINK IT VIOLATES SOME RULE OF ORAL ARGUMENT NEVER TO ASK THE JUDGE A QUESTION. BUT, CAN WE CREATE A CONTRACT OF EMPLOYMENT, EMPLOY PEOPLE OVER A PERIOD OF TIME, NOT HONOR THAT–NOT HONOR THAT CONTRACT, WHICH IS THE ALLEGATION, AND [27] THEN SAY THERE'S NOTHING YOU CAN DO ABOUT IT. YOU JUST CAN'T PAY US.

I THINK BY VIRTUE OF THE STATE LAW, IN FACT ONE OF THE OTHER ARGUMENTS THEY RAISE ABOUT THE ABILITY TO SUBMIT CLAIMS FOR CONTRACT ONCE WE ALLEGE THAT THERE'S A CONTRACT INDEED THERE IS A REMEDY, WHICH IS ALLEGING– THEY ARGUED WE HAVEN'T ABIDED BY THAT, BUT THE STATE LAWS DO RECOGNIZE THAT THE STATE MAY BE SUED FOR ITS CONTRACT. AND AS WE HAVE PLED IN OUR OPPOSITION TO THE IMMEDIATE MOTION IS THAT ALL EMPLOYMENT RELATIONSHIPS ARISE IN THE NATURE OF CONTRACTS. SO IF THERE IS IN FACT A CONTRACT, WITH THE TERMS OF THAT CONTRACT LEFT OPEN TO BE ARGUED, BUT IN FACT THEY ARE NOT REMEDILESS BECAUSE THE STATE MAY BE SUED FOR ITS CONTRACTS.

THE COURT: WELL, BUT I GUESS THE DEFENDANT'S COMPLAINT IS THAT THE TERMS–AS THE DEFENDANT READS THE COMPLAINT, THE PLAINTIFFS ALLEGE THAT THIS IS WORK THAT OUGHT TO BE COMPENSATED AS PART OF THE

JOB, BUT THE DEFENDANT INTENTIONALLY REFUSES TO COMPENSATE AS PART OF THE JOB. NOT THAT THEY AGREED TO IT AND FAILED TO, BUT THAT THEY REFUSED TO CONSIDER THAT AS COMPENSABLE DUTY. DO I HAVE THAT RIGHT, MR. RAB?

MR. RAB: YES. YES. I THINK THAT'S WHAT FIVE, [28] SIX, SEVEN, AND EIGHT SAY.

MR. MCGEEHAN: THEN I THINK WHAT HAS TO HAPPEN IS WHEN GIVEN THE FACT THAT TO THE NATURE OF CONTRACT IS THE COURT HAS TO AT SOME POINT HEAR EVIDENCE ON WHAT WAS THE CONTRACT. WHAT MR. RAB ARGUES IS ALMOST AS IF THE ONLY CONTRACTS THAT EXISTS ARE THOSE EXPRESSED CONTRACTS WHEN HE TALKS ABOUT THE MEETING OF THE MIND, AND THE COURT IS WELL AWARE YOU HAVE–YOU HAVE CONTRACTS THAT ARE IMPLIED IN LAW–

THE COURT: WELL, BUT THAT'S NOT WHAT YOU'VE ALLEGED HERE.

MR. MCGEEHAN: NO, BUT WE'RE SAYING THAT–WHAT WE ARE SAYING HERE IS THAT THERE IS A PARTIALLY INTEGRATED CONTRACT AND A PARTIALLY INTEGRATED CONTRACT MAY ARISE FROM EITHER THE EXPRESSED AGREEMENTS OF THE PARTIES FROM WHAT WERE THE PRACTICES AND POLICIES OF THE UNIVERSITY.

SO WHEN THEY HIRE YOU, THEY SAY WE WILL PAY YOU IN ACCORDANCE WITH THE PRACTICE AND POLICIES OF THE UNIVERSITY. IN FACT I DON'T WANT TO STEP OUT OF BOUNDS OF THE DEMURRER, BUT I WOULD SUBMIT TO THE COURT AND REPRESENT TO THE COURT

THAT AT ONE POINT–SEE WHAT HAPPENED WAS –YOUR HONOR, I DON'T KNOW HOW FAMILIAR [29] YOUR HONOR IS WITH THE FAIR LABOR STANDARDS ACT, BUT AT ONE POINT THE FAIR LABOR STANDARDS ACT WAS NOT APPLICABLE TO STATES.

AND THEN THERE WAS A SERIES OF CASES AND ULTIMATELY THE *GARCIA* DECIDED IT WAS. WELL, I WOULD SUBMIT TO THE COURT THAT THE EVIDENCE WILL SHOW THAT THERE WAS A TIME PRIOR TO *GARCIA* THAT THE UNIVERSITY DID PAY OVERTIME AND THAT THAT ITSELF INDICATES THAT IT WAS THE PRACTICE AND POLICY OF THE UNIVERSITY TO PAY ITS EMPLOYEES OVERTIME. THE EVIDENCE WILL SHOW THAT MOST OF THE EMPLOYEES HAVE BEEN PAID OVERTIME. WE HAVE ARGUED IN OUR OPPOSITION THAT IN FACT THE UNIVERSITY HAS PARTLY PAID THESE–THESE EMPLOYEES UNILATERALLY, I MEAN DURING THE ARGUMENT, BUT IT WASN'T A SETTLEMENT, BUT JUST SAYING WHEN WE MADE THE CLAIM, TWICE THEY HAVE PAID THEM OVERTIME. SO THAT THE AGREEMENT BETWEEN THE PARTIES DOES BESPEAK AN OBLIGATION TO PAY OVERTIME.

SO IT IS NOT AN ISSUE OF WHETHER OR NOT THEY WERE OBLIGED TO PAY OVERTIME, IT'S AN IMPORTANT FACT THEY HAVE DONE SO. THE QUESTION IS WHETHER THEY HAVE PAID ALL OF THE OVERTIME THAT WOULD BE DUE THEM IN ACCORDANCE WITH THEIR PRACTICES, POLICIES, AND EXPRESS REPRESENTATIONS TO THESE EMPLOYEES.

[30] MAY I PROCEED, YOUR HONOR?

THE COURT: GO AHEAD.

MR. MCGEEHAN: NOW, THE SECOND ISSUE IS THAT MR. RAB CITED THE–HE DIDN'T PUT IT IN HIS BRIEF SO I HAD TO WRITE IT DOWN PHONETICALLY, I THINK IT'S *GIANNOUTSOS* CASE. AS I HEAR THAT–

MR. RAB: IT'S IN THE REPLY BRIEF.

MR. MCGEEHAN: I DIDN'T FIND IT IN THE REPLY BRIEF WHEN I GLANCED AT IT. BUT IT SEEMS TO ME HIS REPRESENTATION OF THAT ONCE AGAIN SIMPLY SAYS THAT WHEN THERE IS A POLICY TO HANDLE GRIEVANCES THAT POLICY OUGHT TO BE FOLLOWED. BUT THE CONVERSE GOES BACK TO THE ARGUMENT THAT WHEN THE POLICY EXCLUDES THE HANDLING OF THIS PARTICULAR NATURE OF THE GRIEVANCE THAT IT DOES NOT. AND I FIND SOMETHING VERY, VERY CURIOUS. IF YOU TAKE THE FULL THRUST OF THE *MURRAY VERSUS STOKES* CASE THAT HE CITED, WHY HAVE THEY NOT COME BEFORE THIS COURT WITH AN INTERPRETATION EITHER BY THE DIRECTOR OF DERC, WHO HAS EXCLUSIVE AUTHORITY TO DETERMINE GRIEVABILITY, OR BY THE DIRECTOR OF THE DEPARTMENT OF PERSONNEL TRAINING, WHICH UNDER *MURRAY VERSUS STOKES* IS AN UNREVIEWABLE DECISION THAT SAYS IN FACT THESE CLAIMS ARE INDEED SUBJECT TO GRIEVANCE. THEY–

[31] THE COURT: WELL, DOESN'T THAT WHOLE PROCESS HAVE TO BE INITIATED BY THE EMPLOYEE WHO IS MAKING A COMPLAINT? I MEAN THOSE–

MR. MCGEEHAN: THE EMPLOYEE DID. THE EMPLOYEE DID AND THAT'S WHAT WE PLED. THEY WENT TO THE FIRST–GRIEVANCE PROCEDURES, FIRST YOU GO TO YOUR IMMEDIATE

SUPERVISOR, THEN YOU GO TO THE SUPERVISOR ABOVE THAT. THEY HAVE ALLEGED IN THIS CASE THAT, ONE, THEY WENT TO HUMAN–THEY WENT TO THEIR SUPERVISOR WHO REFERRED THEM TO HUMAN RESOURCES WHO REFERRED THEM TO THE PERSON AT HUMAN RESOURCES WHO HANDLES THESE PROBLEMS AND THEY WERE TOLD IT WAS NOT GRIEVABLE.

NUMBER TWO, WE'VE ALLEGED THAT WE MADE THE CLAIM ON BEHALF OF THESE EMPLOYEES PRIOR TO FILING THE SUIT AND THAT THE PRESIDENT OF THE UNIVERSITY DELEGATED DOWN TO HIS REPRESENTATIVES THE HANDLING OF THAT CLAIM AND THAT THEY HAVE DENIED THE CLAIM. SO WHAT HAPPENS IS WE HAVE GONE THROUGH THOSE TWO STEPS. ONCE THE EMPLOYER INITIATES THE ACTION, THEN THE ACTION SHIFTS TO THE EMPLOYER TO EITHER, ONE, WITHIN FIVE DAYS TO DETERMINE THAT THE MATTER IS GRIEVABLE AND OUGHT TO BE SET FOR A HEARING. OR–OR, TWO, DENY THE GRIEVABILITY OF THE ISSUE. OR, THREE, RESOLVE IT.

[32] SO AT THAT POINT, THE INITIATIVE OR THE ONUS OF ACTION REALLY LAYING WITH THE UNIVERSITY. THESE ARE SIMPLY WORKERS. THESE ARE NOT HUMAN RESOURCE PEOPLE. THESE ARE NOT SOPHISTICATED PEOPLE. AND WHEN THEY INITIATED THE ACTION WITH THEIR FIRST LINE SUPERVISORS WHICH THEY THOUGHT TO DO, THEN THEY WERE REBUFFED AND TOLD THIS IS NOT A GRIEVABLE ISSUE. THEN THEY TURNED TO ATTORNEYS, AS ATTORNEYS WE PRESENTED THE CLAIM ON BEHALF OF THEM, AND WE WERE ULTIMATELY TOLD THE CLAIM

IS DENIED. AND THE UNIVERSITY AT THAT POINT DID NOT THEN SET THE MATTER FOR A GRIEVANCE BOARD NOR DID THEY TELL US TO FILE A GRIEVANCE NOR DID THEY THEMSELVES REQUEST A GRIEVANCE THROUGH THE DERC PROCESS.

NOW, GOING DOWN TO THE–AGAIN, THE, I BELIEVE THE *MERRILL* CASE THAT MR. RAB CITED, WHICH HE TALKED TO, HE GAVE REFERENCE OF AN ILLUSION TO JUDGE MERHIGE'S RULING ON THE BDA. IT'S A DIFFERENT ISSUE WHEN THE RIGHT IS CREATED BY STATUTE VERSUS THE RIGHT IS TO AN EXISTING CONTRACT, AS IS INVOLVED IN THIS CASE. SO I'D SUBMIT THAT THAT CASE ITSELF HAS NO APPLICABILITY. SO WHEN YOU SAY LIKE UNDER *MERRILL* THAT THERE IS NO REMEDY UNLESS IT PROVIDES FOR IN THE BDA, BECAUSE WHATEVER RIGHT–THERE'S NO INHERENT RIGHT TO NOT BE DISCRIMINATED AGAINST [33] BECAUSE OF DISABILITY AND WHAT HAPPENS IS THAT WHATEVER RIGHT DID EXIST HAD TO HAVE BEEN CREATED BY STATUTE. THE HOLDING WAS IN THAT CASE IS IT DIDN'T GIVE A REMEDY TO INDIVIDUALS OR A RIGHT TO SUE. IN THIS CASE WE SAY THERE'S A CONTRACT–COMMON LAW–CONTRACT.

NOW, TURNING TO THE SECOND ARGUMENT–

–THE COURT: BEFORE YOU DO. SO YOUR–YOUR RESPONSE TO THE ARGUMENT THAT THE PROCEDURE–THE PERSONNEL ACT IS THE EXCLUSIVE REMEDY IS THAT IT DOESN'T COVER THIS COMPLAINT, THEREFORE, IT CAN'T BE THE EXCLUSIVE REMEDY?

MR. MCGEEHAN: THAT'S CORRECT. AND IS NOT PRECLUSIVE TO TAKE ANOTHER ACTION.

THE COURT: ALL RIGHT.

MR. MCGEEHAN: TURNING TO THE SECOND ARGUMENT, HE ARGUES THAT–AND AGAIN THIS IS REALLY WHETHER OR NOT WE HAVE PROPERLY PLED CONTRACT, BUT HE SAID THAT WE HAVE–WE HAVE FAILED TO ALLEGE A BREACH OF CONTRACT. IF THE COURT REVIEWS PARAGRAPHS FOUR THROUGH ELEVEN, AND I BELIEVE IT'S TWENTY-FIVE OR TWENTY-SIX OF OUR COMPLAINT, WE DO ALLEGE THAT THERE'S A CONTRACT BETWEEN THE PARTIES, A CONTRACT INCLUDES THE OBLIGATION TO PAY THE WAGES THAT WE'VE SAID, AND THAT IN FACT THEY BREACH [34] THE CONTRACTS. SO CERTAINLY IT IS A MATTER OF DEMURRER THAT IS SUFFICIENT UNDER THE LAWS OF DEMURRER TO ALLEGE THE EXISTENCE OF A CONTRACT, THE BREACH OF A CONTRACT, AND DAMAGES FROM A CONTRACT.

HE, UNDER THAT SAME ARGUMENT, GOES BACK TO HIS ARGUMENT OF SOVEREIGN IMMUNITY AND– I'LL–I'LL–PERHAPS I DIDN'T GRAB WHAT HE WAS SAYING WHEN HE WAS SAYING THAT, BUT AGAIN I JUST REFER BACK TO THE EARLY ARGUMENT THAT WE HAD, WHICH IS RECITED LARGELY IN THE CASE OF *WEEKY (SIC) VERSUS ALLIED MEDICAL* WHICH APPEARS ON PARAGRAPH FIVE OF OUR ORIGINAL OPPOSITION, IT'S 239 VIRGINIA 548, AND THAT CLEARLY SAYS IMMUNITY DOES NOT EXIST IN THE COM*MONWEALTH FOR SUITS IN CONTRACT. SO IF* HIS ARGUMENT IS A CONTRACT CLAIM IS NOT WELL FOUNDED AGAINST THE COMMONWEALTH BECAUSE THERE'S IMMUNITY, THEN THE CASE LAW OBJECTS THAT. AND AS WE ALSO POINTED

OUT IN OUR OPPOSITION, I DARE SAY, YOUR HONOR HAS SAT IN THIS COURT FOR A FEW YEARS, YOU'VE PROBABLY HEARD SOME SUITS IN CONTRACT IN THE COMMONWEALTH AND THEY HAVE FAILED AND DESPITE THE INVITATION TO DO SO TO MAKE A DISTINCTION ON WHY THEY'RE IMMUNE FROM SOME CONTRACTS BUT THEY'RE NOT IMMUNE FROM OTHER CONTRACTS. I DON'T BELIEVE THE COMMONWEALTH EVER INTENDS TO SAY WE CANNOT BE SUED OR NO [35] CONTRACT CAN BE ENFORCED AGAINST US UNDER THE POLICY OF THIS COMMONWEALTH.

AND, THIRDLY, UNDER THE STATUTE T-SELF, IT DOES RECOGNIZE THAT CONTRACT CLAIMS CAN BE PAID.

THE COURT: WHICH STATUTE?

MR. MCGEEHAN: THAT IS 8.01-192, YOUR HONOR. AND WHAT THEY'VE ALLEGED IN THAT CASE, I MIGHT SAY IN PASSING, THAT WE HAVE FAILED TO FOLLOW THE POLICIES IN THAT. WHAT HAPPENS IS THAT YOU CAN EITHER PRESENT A CLAIM TO THE HEAD OF THE AGENCY AND THEY HAVE TO DENY IT AND THEY'VE ALLEGED ALSO THEY FAILED TO DENY IT IN WRITING. AND I DON'T THINK THERE'S MUCH DISPUTE THAT WE'VE MADE A CLAIM TO PRESIDENT BURTON IN THIS CASE AND THAT ON THE ALLEGATION OF THE PLEADING IS THAT IT WAS DENIED. THEY HAD MADE THE ALLEGATION THAT IT WASN'T DENIED IN WRITING, BUT THE ONUS OF PUTTING IT IN WRITING IS ON THE UNIVERSITY.

AND, AGAIN, I WOULD TURN AND ASK THE QUESTION OF IF THE UNIVERSITY ELECTS NEVER TO PUT IT IN WRITING, JUST–JUST ON A WHIM, THEN NO CLAIM WOULD EVER ARISE AND PERHAPS ARGUMENT COULD BE FATAL. BUT I DON'T THINK IT'S EVER THE INTENTION SIMPLY BECAUSE THE HEAD OF AN [36] AGENCY DECIDES TO SIT ON THIS THING THAT NO ONE COULD EVER BRING A CAUSE OF ACTION. AND WE WOULD SUBMIT THE EVIDENCE WILL SHOW THAT THE CLAIM IN FACT WAS DENIED, WHICH IS THE PURPOSE OF THAT STATUTE.

MR. RAB ON THE THIRD ARGUMENT SAID THAT WE HAVEN'T ALLEGED AS TO A BREACH OF THE SECOND CONTRACT.

THE COURT: WELL, WHAT IS THE DIFFERENCE BETWEEN YOUR COUNT ONE AND COUNT TWO?

MR. MCGEEHAN: DIFFERENT WAGES. THE–WHAT HAPPENS IS THESE INDIVIDUALS WERE HIRED TYPICALLY FOR A SALARY TO PERFORM THE OFFICERS DURING REGULAR ASSIGNED DUTY HOURS AS POLICE OFFICERS–SWORN POLICE OFFICERS AT THE UNIVERSITY. THEY'RE ACTUALLY STATE POLICE OFFICERS, BUT NOT STATE POLICE. AND THAT IS COUNT ONE.

COUNT TWO SAYS THAT DURING THE COURSE OF THAT EMPLOYMENT THEY WERE TOLD THAT THEY COULD PERFORM SERVICES OUTSIDE OF THOSE REGULAR DUTY HOURS. AS WE PUT IN OUR PLEADINGS, TWO TYPICAL AREAS WHERE THEY WERE OFTEN ASSIGNED WERE PERFORMANCES AT THE PERFORMANCE CENTER FOR THE PERFORMING ARTS AND AT THE PATRIOT CENTER. AND THEY WERE–THEY WERE

TOLD ORALLY THAT THEY WOULD BE PAID TWENTY-FIVE DOLLARS AN HOUR FOR THAT TIME. THEY THEN PERFORMED THOSE SERVICES BUT THEY WEREN'T PAID TWENTY-[37] FIVE DOLLARS AN HOUR BUT EXPENSES WERE DEDUCTED FROM THAT, SO THE NET SUM WAS DIFFERENT.

SO IT IS MOONLIGHTING I THINK AS WE TERM IT IN OUR PLEADING. SO THERE IS, ONE, A CONTRACT WITH A BASIC EMPLOYMENT AS POLICE OFFICERS FOR THE UNIVERSITY AND TWO IS MOONLIGHTING FOR SECURITY FOR THESE OUTSIDE EVENTS.

NOW, HE ALLEGED THAT WE HADN'T–WE HADN'T ALLEGED THAT THERE WAS A BREACH. IN PARAGRAPH TWENTY-EIGHT WE DO ALLEGE THERE WAS A BREACH. AND FOR THE PURPOSES OF PLEADING AGAIN, IT IS SUFFICIENT FOR US SIMPLY TO ALLEGE THE BREACH AND IF THAT NEEDS TO BE FLESHED OUT, IT NEEDS TO BE FLESHED OUT BY WAY OF DISCOVERY.

THE COURT: ALL RIGHT. YOU SAID PARAGRAPH TWENTY-EIGHT. WHICH CASE IS THAT ON?

MR. MCGEEHAN: THAT IS IN THE AMENDED COMPLAINT.

THE COURT: IN–I'M LOOKING AT THE AMENDED COMPLAINT IN THE *FOSTER* CASE–

MR. MCGEEHAN: *DOUGALL*–

THE COURT: ALL RIGHT.

MR. MCGEEHAN: –*DOUGALL*; PAGE ELEVEN, *DOUGALL*. WE SORT OF ALL WORKED THAT'S OUR INITIATING ONE, AND WE HAVE OFFICER DOUGALL WITH US. DID OFFICER–WHETHER HE'S ENGAGED IN COLLECTIVE BARGAINING, HE'S BEEN THE POINT MAN–

THE COURT: OKAY.

MR. MCGEEHAN: IT SAYS DID YOU BREACH THE–BUT UNFORTUNATELY IT'S UNGRAMMATICAL, THE SEPARATE CONTRACT WITH PLAINTIFF BY NOT PERFORMING THE MATERIAL TERMS OF THE CONTRACT. DID YOU BREACH A SEPARATE CONTRACT BY FAILING TO COMPENSATE THE PLAINTIFFS AT THE AGREED UPON RATE FOR ALL HOURS THE PLAINTIFF WORKED. BUT WE HAVE ALLEGED FOR NONPAYMENT AND THEN, AS IN ANY DEBT CASE, THE ANSWER MAY BE HOW MUCH DIDN'T WE PAY YOU AND WHAT IS THE NATURE OF YOUR CLAIM.

THEN JUMPING AHEAD ACTUALLY TO NUMBER FIVE, I'LL COME BACK TO NUMBER FOUR, WHICH IS WHETHER OR NOT YOU HAVE TO MAKE A RECITATION OF DAMAGES. WE RELIED IN PART ON THE ONE CASE OUT OF LOUDOUN, BUT FRANKLY IF YOU GO BACK TO THE OLD LAW OF VIRGINIA IN THE MATTER OF COMMON LAW PLEADINGS, THERE IS THE CASE OF *CRAGHILL*, C-R-A-G-H-I-L-L *VERSUS PAGE*, WHICH APPEARS AT TWO HENRY PAGES 446 AND 448. I HAVE COPIES OF THESE TO GIVE YOUR HONOR. *DIGGS VERSUS NORRIS*, WHICH APPEARS AT THREE HENRY [39]PAGE 266. AND *STEVENS VERSUS WHITE*, WHICH APPEARS AT TWO WASHBURN, PAGES 201 AND 203. AND WHAT ALL OF THESE CASES STAND FOR IS AS A MATTER OF PLEADING IS–WELL, AS MR. RAB SAID, IT MAY BE PRACTICE IN THIS COMMONWEALTH TO MAKE A SPECIFIC SUM AS A PART OF A PLEADING. IT DOESN'T MEAN THE PLEADING IS INSUFFICIENT IF YOU FAIL TO DO SO. AND WHAT'S UNIQUE IN THIS CASE IS WE'RE WAITING FOR DISCOVERY.

NOW, MR. RAB AND I HAVE REACHED AN AGREEMENT FOLLOWING A MOTION LAST WEEK OR PRIOR TO THE MOTION I SHOULD SAY LAST WEEK, THAT HE WILL FILE RESPONSES TO DISCOVERY THAT WE SUBMITTED AT THE SAME TIME THAT THE COURT MAY REQUIRE HIM TO FILE AN ANSWER IN THIS CASE. SO TO QUANTIFY WITH ANY EXACTITUDE, WE ACTUALLY NEED THEIR RECORDS. SO THAT'S WHY WE PLED IT AS WE DID. WE WEREN'T BEING UNDULY CLEVER, I HOPE. BUT WHAT WE ALSO SAY IS THAT UNDER THESE CASES, ALL OF WHICH ARISE IN THE BEGINNING OF THE NINETEENTH CENTURY, IS THAT IT DOES MAKE A PLEADING INSUFFICIENT BY FAILURE TO PLEAD AN EXACT SUM, BUT RATHER IF THE SUM OF PLEADINGS AT ANY POINT PRIOR TO THE ENTRY OF JUDGMENT ANYWHERE IN THE RECORD THEN IT'S SUFFICIENT. AND THEY ALSO APPLIED THE STATUTE OF JAIL BILL (SIC) WHICH ALLOWS THE CORRECTION OF ANY RECORD AS [40] LONG AS IT APPEARS WITHIN THE RECORD IF IT'S SIMPLY AN OMISSION.

NOW, I DON'T KNOW IF THAT TRULY IS APPLICABLE HERE BECAUSE IT WAS AN INTENTIONAL OMISSION BUT CERTAINLY BEFORE THIS CASE COMES TO TRIAL WE WOULD–WE WOULD GIVE THEM WITH SPECIFICITY WHAT THE AMOUNT OF THE DAMAGES ARE, BUT WE NEED THEIR RECORDS TO DO SO.

AND THEN THE THIRD POINT IN THE NATURE OF HOW WE PLED THE CASE IS THAT BECAUSE IT IS SUFFICIENT AND MEETS MINIMAL STANDARDS AND WILL BE FLESHED OUT WITH DISCOVERY THAT THEY HAVEN'T REALLY BEEN PREJUDICED IN ANY ASPECT IN THIS REGARD BY PLEADING

AS WE DID AND PRACTICED. I GUESS WHAT I THINK ABOUT IS HOW OFTEN, I DON'T KNOW THAT YOUR HONOR DID THIS WHEN YOU PRACTICED LAW, THAT A LOT OF TIMES THE AD DAMNUM IS NO MORE THAN A GOOD GUESS, AND I GUESS I COULD PUT IN A MILLION DOLLARS OR I COULD PUT IN MORE THAN FIFTEEN THOUSAND DOLLARS AND NEITHER ONE IS GOING TO INFORM THEM A WHOLE LOT. WE'RE GOING TO GET DISCOVERY ON IT TO MAKE THAT NUMBER MORE PRECISE AND IT'S INCONSEQUENTIAL TO THE MATTER OF PLEADINGS WHETHER I GUESSED AT A MILLION OR SAID MORE THAN FIFTEEN THOUSAND.

SO GOING BACK AGAIN TO THE FACT OF WHETHER OR [41]NOT WE HAVE ALLEGED A BREACH. WE'VE ALLEGED A BREACH AND WE HAVE TO HAVE MORE SPECIFICITY, INDEED WE DO AND THAT'S A PROCESS I BELIEVE THAT WILL TAKE PLACE BY VIRTUE OF DISCOVERY.

THE LAST ARGUMENT WHICH I WISH TO ADDRESS IS THAT OF JOINDER. I BELIEVE MR. RAB HAS TRIED TO CREATE A DILEMMA FOR US. HE EITHER SAID THAT THESE OUGHT TO BE TWENTY-EIGHT SEPARATE CAUSES OF ACTION OR THAT WE HAVE ENGAGED IN COLLECTIVE BARGAINING. I THINK THAT THAT'S A FALSE ANALOGY ON HIS PART.

FIRST, LET ME EXPLAIN TO THE COURT WHY THE ACTION BEGAN AS IT DID. *ALDEN VERSUS MAINE* NEVER–DIDN'T THROW OUT THE FAIR LABOR STANDARDS ACT BUT SIMPLY SAID IS THAT–THAT A STATE IS IMMUNE FROM A SUIT UNDER THE FAIR LABOR STANDARDS ACT. IN THE FAIR LABOR STANDARDS ACT, WHICH CER-

TAINLY WAS TOTALLY VIABLE AT THE TIME THAT WE FILED THIS LAWSUIT, IT PERMITTED INDIVIDUALS TO SUE IN MORE OR LESS A REPRESENTATIVE MATTER, BUT IT'S NOT FULLY A CLASS ACTION. IT'S A PECULIAR ACTION FOR THE FAIR LABOR STANDARDS ACT, SO AT THE TIME THAT WE FILED THE SUIT, INDEED THAT IS VALID.

TWO, *ALDEN VERSUS MAINE* MAY SAY THERE'S A SUIT–THEY'RE IMMUNE FROM A RECOVERY ON A SUIT, BUT IT [42] DOESN'T MEAN THE PROCESS THAT BEGAN THE INITIAL LAWSUIT BEGINS ALL OVER AGAIN BECAUSE THE FAIR LABOR STANDARDS ACT IS NOT APPLICABLE TO THE STATE. IN FACT *ALDEN VERSUS MAINE* SAYS IT IS APPLICABLE TO THE STATE BECAUSE THE UNITED STATES GOVERNMENT THROUGH THE DEPARTMENT OF LABOR COULD INITIATE A SUIT, SO THERE'S NO QUESTION ABOUT THAT. SO I DON'T THINK *ALDEN* EVER THREW OUT THE PROCEDURE.

THIRDLY, IS AT THIS POINT I THINK WE EVEN MEET THE STANDARDS. AND WE ARGUED THIS LAST NIGHT IN FRONT OF JUDGE STITT. WE MEET THE STANDARDS FOR A PROPER JOINDER. AND THE COURT AT SOME POINT WHEN THEY FEEL WE DIDN'T MEET THE STANDARDS COULD SEVER THE LAWSUIT. SO THE PROCEDURE I MAY SUGGEST TO THE COURT IS WE GO FORWARD WITH DISCOVERY AND THEN AS WE'RE APPROACHING TRIAL DATE DECIDE DOES THE COURT WANT TO SEVER THESE ACTIONS. BUT IF YOU LOOK REALLY ABOUT THE–WHEN HE TALKED ABOUT EFFICIENCY AND ECONOMY–MR. RAB TALKED EFFICIENCY AND ECONOMY, THE QUESTION IS

DOES THIS COURT WANT TO MANAGE TWENTY-EIGHT LAWSUITS OR DOES IT WANT TO MANAGE FOUR LAWSUITS.

AND I THINK THE ARGUMENT–THE TELLING ARGUMENT, IF I MAY SAY SO, EFFICIENCY AND ECONOMY IS IN THESE EARLY STAGES OF PLEADING, AS WE ARE EFFECTIVELY ABLE TO DO HERE, WE WILL ARGUE THEM TOGETHER, HANDLE THEM [43] TOGETHER, AS AN ECONOMICAL MEASURE AND IF THERE COMES A POINT WHERE THERE IS SOME LEVEL OF PREJUDICE MORE OR LESS, WE DON'T EVEN KNOW WHETHER WE'RE GOING TO HAVE A JURY TRIAL RIGHT NOW, THAT'S ALWAYS THE ARGUMENT IN JOINDER, YOU USE A JURY TRIAL. I'VE ALWAYS HAD CONFIDENCE A JUDGE COULD SORT THESE THINGS OUT. BUT IF HE HAS A SUBSTANTIVE ARGUMENT ON WHY THERE IS SOME PREJUDICE TO THE DEFENDANTS TO LEAVE THESE MATTERS BE ADMINISTERED AT THIS POINT IN A COMMON FACTOR THAT THAT WOULD BE AN APPROPRIATE TIME TO MAKE IT.

SO I THINK THAT, ONE, THERE IS A CORRECT JOINDER AT THIS JUNCTURE. THERE WAS THE INITIATION OF THE PLEADING AT THIS JUNCTURE. THEN WE'RE NOT IN THE DILEMMA OF COLLECTIVE BARGAINING, BUT I DO WISH TO RAISE THAT ISSUE. RECITED TO THE COURT THE *ARLINGTON* CASE WHICH DEFINITIVELY DEFINES THE–WHAT IS COLLECTIVE BARGAINING IN VIRGINIA, AND THIS IS NOT COLLECTIVE BARGAINING SIMPLY BECAUSE PEOPLE MAY BE ASKING FOR SOME PROMISE OF ACTION. THERE HAS TO BE A MUTUALITY IN THAT SENSE WHERE THE STATE ACCEPTS AS A BARGAINING UNIT AND

THEY'RE BARGAINING ABOUT THE CURRENT CONDITIONS OF EMPLOYMENT AND NOT A BREACH OF A COMMON CONTRACT.

AND WE HAD SUGGESTED IN OUR BRIEF SANCTIONS [44] COULD EVEN BE APPROPRIATE FOR THAT, THAT ARGUMENT IS SO FACETIOUS. AND THEN CERTAINLY THERE IS NOT COLLECTIVE BARGAINING IN THIS CASE SIMPLY BECAUSE WE INITIATED THE ACTION AS PERMITTED AT THAT TIME UNDER THE FAIR LABOR STANDARDS ACT.

SO, THEREFORE, IN SUMMARY, YOUR HONOR, WHAT THIS CASE IS ABOUT IS, ONE, THE FAILURE TO PAY THEM IN ACCORDANCE WITH THEIR CONTRACT FOR SERVICES AS POLICE OFFICERS AND FAILURE TO PAY THEM AS THEY HAD REPRESENTED THEY WOULD DO FOR OUTSIDE EMPLOYMENT, OR MOONLIGHTING EMPLOYMENT. WE HAVE ALLEGED THE EXISTENCE OF A CONTRACT. WE HAVE ALLEGED A BREACH OF THE CONTRACT. AND WE HAVE ALLEGED DAMAGES. AND WE SUBMIT THAT OUR PLEADING IS SUFFICIENT FOR THAT PURPOSE. THANK YOU.

THE COURT: WELL, WHAT'S THE BASIS FOR THE PLAINTIFFS REQUEST FOR ATTORNEY'S FEES?

MR. MCGEEHAN: IT WAS WHETHER OR NOT THE TWO SEVENTY-ONE STANDARD WOULD BE MET FOR THEIR CLAIM ON COLLECTIVE BARGAINING. I SOMEWHAT UNDERSTOOD A LITTLE BETTER TODAY THAT WHAT HE REALLY WAS TRYING TO DO WAS PUT US INTO A LOGICAL DILEMMA. BUT WHEN HE FIRST ASSERTED THAT WE VIOLATED PUBLIC POLICY BY BRINGING

THESE LAWSUITS AND ENGAGING IN COLLECTIVE BARGAINING, I THOUGHT THAT [45] ARGUMENT WAS JUST SO ILL FOUNDED IN FACT AND LAW THAT TWO SEVENTY-ONE WAS APPLICABLE.

I MIGHT ALSO SAY THAT WHILE HE DOESN'T ARGUE IT, THE THRUST OF HIS ARGUMENT IS BY THE MERE FACT THAT I REPRESENT ALL OF THESE OFFICERS AS COLLECTIVE BARGAINING AND I'M A UNION AND I THINK THAT I'M NOT A UNION.

THE COURT: AT LEAST YOU DON'T CHARGE DUES.

MR. MCGEEHAN: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, THANK YOU, MR. MCGEEHAN. MR. RAB?

MR. RAB: YOUR HONOR, THE DEFENDANTS HAVE ACTUALLY BRIEFED US FOUR TIMES AND I'VE SOMEWHAT FORGOTTEN, YOU HONOR. IT WASN'T THE JUDGE–THE FIRST–TIME OTHER JUDGES HAVE DEALT WITH THIS EXCLUSIVE REMEDY ISSUE–

THE COURT: YOU MEAN YOU'VE BRIEFED IT IN FOUR DIFFERENT COURTS OR IN THIS–

MR. RAB: NO, I–WE BRIEFED IN THIS CASE FOUR TIMES.

THE COURT: OKAY.

MR. RAB: YOU HAVE A PLEADING THAT WAS FILED JULY 6TH, 1999, AS DEFENDANT'S FIRST BRIEF AND THAT COVERED THIS VIRGINIA PERSONNEL ACT ISSUE. AND SO DID WE [46] COVER ON AUGUST THE 6TH OF 1999. WHAT I DIDN'T DO IS REWRITE THE SAME MATERIALS BUT I KNOW IT'S QUITE A BURDEN TO GO BACK AND

READ MORE, BUT WHAT I WANT TO MENTION TO YOUR HONOR IS TWO OTHER TRIAL COURT JUDGES HAVE DEALT WITH THIS ISSUE OF WHETHER THE VIRGINIA PERSONNEL ACT IS THE EXCLUSIVE REMEDY AND I CITE THEM IN I THINK THE JULY 6TH BRIEF AND I HADN'T MENTIONED THEM IN MY ORAL ARGUMENT.

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTGOMERY IN THE CASE OF ALFRED CAPLE, AND I'LL READ THE COURT'S ORDER, PLAINTIFF ALFRED CAPLE ALLEGES THAT HIS DISCHARGE FROM EMPLOYMENT FROM THE VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY WAS TAINTED BY RACIAL DISCRIMINATION AND HE'S SEEKING RECOVERY UNDER STATE LAW AGAINST VPI AND HIS FORMER SUPERVISOR, MARGIE LAWRENCE. NOTING THAT THE PLAINTIFF'S COMPLAINT ALLEGES THAT HE'S RAISED THIS COMPLAINT WITH THE GRIEVANCE PROCEDURE FOR STATE EMPLOYEES AND THAT A GRIEVANCE PANEL UPHELD PLAINTIFF'S TERMINATION. DEFENDANT DEMURRED ARGUING THE POWER RULING WAS NOT REVIEWABLE BY THIS COURT AND THAT THE GRIEVANCE PROCEDURES EXCLUSIVE MEANS UNDER STATE LAW FOR CHALLENGING HIS TERMINATION. AND I GO TO THE ARGUMENT OF COUNSEL AND REVIEW THEIR BRIEFS THE COURT [47] FINDS THAT THE GRIEVANCE PROCEDURE FOR STATE EMPLOYEES PROVIDED GOVERNED BY CODE SECTION 2.1-110 OF THE CODE OF THE VIRGINIA, AS AMENDED, IS THE EXCLUSIVE MEANS UNDER STATE LAW BY WHICH A STATE EMPLOYEE COVERED BY THAT PROCEDURE CAN CHALLENGE HIS DISCHARGE.

MOREOVER, THIS COURT FINDS THAT THE RULING OF THE GRIEVANCE PANEL IN THIS CASE IS ENTITLED TO RES JUDICATA BEING BASED UPON A FULL EVIDENTIARY HEARING.

I'LL CONCEDE THAT WAS A DISCHARGE CASE. THERE IS ALSO THE CASE OF MICHAEL SIGMON, WHICH IS IN THE CIRCUIT COURT OF BOUTETORT COUNTY–

THE COURT: BOUTETORT.

MR. RAB: BOUTETORT. THANK YOUPLAINTIFF MICHAEL SIGMON ALLEGES IN HIS MOTION FOR JUDGMENT THAT THE COMMONWEALTH OF VIRGINIA DEPARTMENT OF ALCOHOL BEVERAGE CONTROL WRONGFULLY DISCHARGED HIM IN VIOLATION OF VIRGINIA PUBLIC POLICIES SET FORTH AND VARIOUS STATUTES. FOR THE WRONGS ALLEGED IN THAT MOTION FOR JUDGMENT, WHICH INCLUDES VIOLATIONS OF SUBSTANTIVE AND PROCEDURAL RIGHTS, PLAINTIFF SEEKS COMPENSATORY AND PUNITIVE DAMAGES AS WELL AS COST OF ATTORNEY'S FEES.

THE SOLE DEFENDANT NAMED IN PLAINTIFF'S MOTION FOR JUDGMENT IS THE COMMONWEALTH OF VIRGINIA ALCOHOL [48] BEVERAGE AS WELL AS THE AGENCY. DEFENDANT DEMURRER ARGUING PLAINTIFF'S CLAIM WAS BECAUSE THE BAR–BECAUSE THE VIRGINIA TORT CLAIMS ACT AFFORDS THE SOLE REMEDY AND PLAINTIFF CHOSE TO CHALLENGE THE DISCHARGE ON PROCEDURES AVAILABLE TO HIM UNDER LAW ENFORCEMENT OFFICERS PROCEDURAL GUARANTEES AND THIS PROCEDURE PROVIDES THE PLAINTIFFS EXCLUSIVE REMEDY

FOR HIS CLAIM OF WRONGFUL DISCHARGE. HAVING HEARD THE ARGUMENTS OF COUNSEL—

THE COURT: SO YOU'RE—

MR. RAB: —AGAIN, THERE HAVE BEEN A COUPLE OF JUDGES WHO, WHERE THE PLAINTIFF HAS ATTEMPTED TO GET CIRCUIT COURT REVIEW OF THE GRIEVANCE DECISION OR CIRCUIT COURT APPLICATION OF A GRIEVANCE DECISION, HAVE SAID THAT THE SOLE REMEDY FOR PLAINTIFF'S CHALLENGE TO HIS TERMINATION COMES BY THE GRIEVANCE PROCEDURE.

WHAT I'M SAYING IS, A TERMINATED PLAINTIFF WHO IS A STATE WORKER, A CLASSIFIED STATE WORKER, CANNOT COME INTO COURT AND CLAIM THIS COMMON LAW RIGHT OF BREACH OF CONTRACT.

THE COURT: BECAUSE THE STATUTE HAS ABROGATED THAT COMMON LAW RIGHT.

MR.RAB: THAT STATUTE HAS ABROGATED—THE STATUTE CREATED, I THINK, THE ONLY REMEDIES THAT STATE [49] WORKERS HAVE AGAINST THE STATE. REMEMBER THIS IS A SOVEREIGN YOU'RE DEALING WITH. YOU HAVE TO HAVE A STATUTE. THE PLAINTIFF HAS TO HAVE A WAY TO GET INTO A REMEDY OF THE COURT. THIS IS NOT A MATTER THAT THE BURDEN IS ON THE COMMONWEALTH TO SHOW TO NEGATE THINGS. THE BURDEN IS ON THE PLAINTIFF TO SHOW I HAVE A REMEDY BECAUSE THIS IS AGAINST THE SOVEREIGN.

MR. MCGEEHAN WAS TALKING ABOUT THIS PRINCIPLE OF CONTRACT. AND EVERYBODY KNOWS IT SAYS ESSENTIALLY YOU CAN SUE THE COMMONWEALTH FOR BREACH OF THESE CONTRACTS. WELL, WHAT THERE IS IS A RECOGNI-

TION THAT WE HAVE A DUE PROCESS AND DEPRIVATION OF PROPERTY CLAUSE IN THE VIRGINIA CONSTITUTION. I THINK IT'S ARTICLE ONE, SECTION ELEVEN. IT SAYS THAT WE CANNOT TAKE AWAY A PERSON'S PROPERTY OR IMPAIR THE OBLIGATIONS OF CONTRACTS WITHOUT DUE PROCESS. SO THE SUPREME COURT HAS RECOGNIZED THAT WHERE A PARTY COMES INTO COURT AND SAYS, I HAVE A CONTRACT WITH THE STATE, I DELIVERED THE GOODS, I'M ENTITLED TO BE PAID. OR WHEN A PARTY SAYS, MY LAND WAS DAMAGED BY THE STATE. I HAVE BEEN DEPRIVED OF PROPERTY RIGHTS. THE STATE CANNOT ENJOY SOVEREIGN IMMUNITY IN ABROGATION OF THE STATE CONSTITUTION. THAT'S WHERE THIS COMES FROM. SO–

[50] THE COURT: BUT IF THE STATE SETS UP A REMEDY THAT REALLY IS EMPTY AT LEAST WITH RESPECT TO SOME ISSUES, SUCH AS COMPENSATION, THEN ISN'T THAT ESSENTIALLY A DEPRIVATION?

MR. RAB: WELL, IT'S TWO WAYS–I'LL ANSWER THAT. NO, BECAUSE THE ONLY ABROGATION OF THE SOVEREIGN IMMUNITY WITH RESPECT TO STATE WORKERS HAS BEEN THAT THEY THE RIGHTS AND IT'S IN 2.1-116.06, THEY CAN CHALLENGE THE APPLICATION OF ALL WRITTEN PERSONNEL POLICIES, PROCEDURES, RULES AND REGULATIONS WHERE IT CAN BE SHOWN THAT THE POLICY WAS MISAPPLIED OR UNFAIRLY APPLIED. THEY CAN CHALLENGE, IF A GRIEVANCE SAYS THAT I THINK THE POLICY OF THE STATE IS TO PAY THE OVERTIME UNDER THESE CIRCUMSTANCES. THEY CAN GRIEVE THAT. MR. MCGEEHAN IS FORGETTING THAT

THERE IS A WORD IN SECTION C, THE WORD "SOLELY," WHAT IT SAYS IN SECTION C IS COMPENSE (SIC) RELATED SOLELY TO THE FOLLOWING ISSUES SHALL NOT PROCEED TO A HEARING.

IF THIS WAS SOLELY ABOUT WAGES, IT WOULD APPEAR NOT TO BE GRIEVABLE. BUT THE STATE ALLOWS STATE WORKERS TO CHALLENGE IN THIS APPLICATION OF THE POLICIES. I DON'T THINK THAT IN VIRGINIA THERE IS A PROPERTY RIGHT IN A STATE EMPLOYEE TO BE PAID FLSA OVERTIME. DON'T MISS [51] THE TWO CONCEPTS BEING DIFFERENT. WE HAVE PAID THESE PEOPLE OVERTIME. WE'VE PAID THEM OVERTIME, WE HAVE THE STATE PERSONNEL POLICY THAT SAYS THAT CERTAIN WORKERS ARE PAID. WE PAY OVERTIME ALL THE TIME. THE ISSUE IS NOT WHETHER WE SHOULD PAY OVERTIME, IT'S WHETHER THIS WAS WORK.

THEY'RE SAYING THAT THIS ROLL CALL AND HIS HOME WORK WAS WORK. THAT'S THE ISSUE IN THIS CASE. IT'S NOT WHETHER WE'RE OBLIGATED TO PAY OVERTIME, IT'S WHETHER THESE HOURS SHOULD BE ADDED ON. THIS CLAIM IS NOT ABOUT WHETHER THE STATE PAYS OVERTIME. THE STATE HAS NOT BEEN SENDING A MIXED MESSAGE ON THIS ISSUE. THE STATE DOES PAY OVERTIME AS A MATTER OF STATE POLICY, WHEN YOU EXCEED FORTY HOURS IN A WORK WEEK, OR IN SOME CASES WHEN YOU EXCEED A DIFFERENT MAXIMUM BECAUSE THEY'RE POLICE OFFICERS, BUT WE DON'T NEED TO GET INTO THAT HERE. NO, THE ISSUE HERE IN THIS CASE IS WHETHER THESE HOURS ARE HOURS WORKED. THAT'S WHERE THE PLEADING HAS BEEN INCONSISTENT. THEY'VE SAID THAT WE DON'T EVEN

ACCEPT THE PROPOSITION. IT SAYS WE DON'T COUNT UNTIL YOU REPORT THESE HOURS, BECAUSE THEY'RE NOT HOURS WORKED.

SO, NO, I DO NOT THINK WE HAVE EFFECTED A DEPRIVATION OF A PROPERTY RIGHT BECAUSE ALL THESE STATE [52] WORKERS ARE CLAIMING IS THAT WE THINK SOMETHING SHOULD BE CONSIDERED WORK NOT WE HAVE DONE WORK. THERE'S BEEN NO COURT THAT'S DECIDED THAT WHEN MR. DOUGALL CLEANS HIS WEAPON AT HOME AFTER HOURS, OR WHEN HE WRITES A REPORT AFTER HOURS, NO COURT HAS DECIDED THAT THIS IS WORK. THAT REMAINS TO BE DECIDED.

THE COURT: WELL, BUT YOU'RE SAYING IT'S NOT GOING TO BE DECIDED IN THIS CASE.

MR. RAB: I'M SAYING THAT THIS COURT DOES NOT HAVE TO DECIDE WHETHER 2.1-116.06 DOES ENCOMPASS THIS CLAIM BECAUSE IT'S NOT BEFORE THIS COURT ON A GRIEVABILITY ISSUE. THAT'S NOT HERE NOW. I–I WANT TO TAKE ISSUE WITH THE NOTICE THAT YOU–THE NOTION THAT YOU CAN VERBALLY–A STATE EMPLOYEE CAN VERBALLY ASK THE DEPARTMENT OF HUMAN RESOURCES, HE HAS NO DOCUMENT, WHETHER OR NOT THIS IS GRIEVABLE, GET THAT ANSWER, AND CLAIM THAT HE'S EXHAUSTED HIS ADMINISTRATIVE REMEDY. I TAKE ISSUE WITH THAT NOTION.

AGAIN, WE'RE TALKING ABOUT ABROGATION OF THE STATE'S IMMUNITY. YOU HAVE TO EXHAUST A PROCESS, FILE A GRIEVANCE, GET THE GRIEVABILITY ISSUE UP BEFORE A HEARING OFFICER, AND THEN TAKE IT TO A CIRCUIT COURT FOR REVIEW OF THE GRIEVABILITY

ISSUE. THERE'S NO DISPUTE THAT [53] GRIEVABILITY ISSUES ARE REVIEWABLE BY THE CIRCUIT COURT. IT'S CLEAR IN THE STATUTE. SO, IN SUM, I DON'T THINK THIS COURT GETS TO THE ISSUE OF WHETHER OR NOT THERE'S A DEPRIVATION OF DUE PROCESS. I WILL ADD THAT ON NOVEMBER 2ND, 1999, I APPEARED BEFORE THE VIRGINIA SUPREME COURT AND THIS ISSUE HAS BEEN RAISED IN A CASE ENTITLED *LUZIK VERSUS THE COMMONWEALTH*.

THE COURT: THAT'S ONE THAT'S PENDING RIGHT NOW?

MR. RAB: RIGHT. I ARGUED THE APPEAL ON NOVEMBER 2ND. THE SUPREME COURT HAS NOT GIVEN A DECISION. I WOULD CERTAINLY BE HAPPY TO INFORM THIS COURT IF YOU WANTED TO BE KEPT APPRAISED. I DON'T KNOW WHETHER THE SUPREME COURT WILL ADDRESS THE ISSUE. THEY MAY SIMPLY SAY THERE WAS A LACK OF JURISDICTION IN THE TRIAL COURT LEVEL.

THE COURT: WHAT'S THE ISSUE THAT THEY GRANTED–

MR. RAB: IT WAS A PURE FSLA CASE HANDLED BEFORE THE *ALDEN* CASE CAME DOWN AND A JUDGMENT WAS ENTERED AGAINST THE DEPARTMENT OF JUVENILE JUSTICE, MONEY DAMAGES OF ABOUT A QUARTER OF A MILLION DOLLARS FOR FLSA VIOLATIONS. IT WENT UP AND IT WAS BRIEFED ON THE ISSUE [54] OF WHETHER OR NOT VIRGINIA LIKE MAINE ENJOYS SOVEREIGN IMMUNITY. JUDGE STITT RULED THAT VIRGINIA DOES ON THE TRIAL LEVEL.

THE COURT: WELL IS THERE ANY REASON WHY VIRGINIA WOULDN'T BE TREATED LIKE MAINE WOULD BE TREATED?

MR. RAB: THE ARGUMENT WAS MADE BY MY OPPONENT, MICHAEL LEIBIG, WHO'S A FAIRFAX LAWYER AND VERY TALENTED, THAT THERE WOULD BE A DEPRIVATION OF DUE PROCESS BECAUSE THE PROBATION OFFICERS ACTUALLY DID SOME WORK AND THEY WOULDN'T BE PAID FOR THE WORK. SO THAT–THAT ARGUMENT WAS PART OF THE–ARGUMENT ASKING FOR AFFIRMANCE OF THE TRIAL COURT'S JUDGMENT. HE ARGUED IT WAS WORK.

SO WE–WE ARE IN A STATUS OF WAITING FOR THE SUPREME COURT, BUT I'M NOT SO SURE THE SUPREME COURT WILL ARTICULATE THE BASIS, YOU KNOW, IN THAT DETAIL. I DON'T WANT TO PROMISE THIS COURT THAT THERE WILL BE A RULING THAT WILL DISCUSS THAT–

THE COURT: WELL, I'M NOT SURE IF THAT ISSUE–THAT SAME ISSUE IS SQUARELY PRESENTED IN THIS CASE ANYWAY.

MR. RAB: I'M NOT SURE EITHER. I'M TRYING TO BE FULLY IMPLICIT IN TERMS OF THE PRESENTATION. I THINK THIS COURT CAN DECIDE THAT THE VPA HOWEVER INADEQUATE IT [55] MAY APPEAR TO MR. DOUGALL, WHATEVER LIMITATIONS HE OPERATES UNDER, THAT THE VPA AND THE DERC STATUTE ARE THE EXCLUSIVE REMEDY FOR STATE CLASSIFIED WORKERS. THERE'S NO ISSUE BUT THAT MR. DOUGALL AND THE OTHERS ARE STATE CLASSIFIED WORKERS. IT SAYS SO IN THE CODE, WHICH DEFINES CAMPUS POLICE OFFICERS, AND THAT THIS COURT IS NOT GOING TO DECIDE WHETHER OR NOT HE HAD THAT REMEDY.

THIS COURT IS ONLY GOING TO DECIDE THAT THEY CAN'T AVOID THAT REMEDY AND

COME DIRECTLY INTO COURT CLAIMING A BREACH OF CONTRACT. THAT YOU CANNOT HAVE A COMMON LAW CONTRACT BETWEEN THE STATE UNIVERSITY AND STATE WORKERS. I THINK THE COURT CAN MAKE THAT DECISION WITHOUT GETTING INTO THE FULL EXAMINATION OF WHAT I THINK IS AN UNCLEAR OVERLAP BETWEEN 2.1-116.06 A AND B, WHERE IT SAYS YOU CAN CHALLENGE THE APPLICATION OF PERSONNEL POLICIES, BUT THEN IT SAYS WE WON'T HEAR A COMPLAINT SOLELY ABOUT WAGES. WELL, I'M NOT SO SURE THAT MR. DOUGALL'S COMPLAINT IS SOLELY ABOUT WAGES. IT COULD BE ARGUED THAT IT'S ABOUT TIME. HE'S NOT SAYING I'M NOT PAID ENOUGH FOR MY WORK, HE'S SAYING I NEED CERTAIN TIME THAT I WORK TO BE COUNTED AS PAYABLE. SO I THINK THAT ISSUE IS OPEN AND SOME DAY IN ANOTHER FORUM IT WILL BE RAISED AND DECIDED. DO YOU HAVE ANY FURTHER QUESTIONS?

THE COURT: NO.

MR. RAB: I ALSO—I THINK BRIEFED THE ATTORNEY'S FEE ISSUE. I THINK THAT EVEN IF THERE'S A COMMON LAW CONTRACT UNDER WELL ESTABLISHED PRINCIPLES, YOU NEED TO HAVE A STATUTE. YOU NEED TO HAVE A CONTRACT WHICH SAYS THERE WOULD BE ATTORNEY'S FEES OR YOU NEED TO HAVE FRAUD OR BREACH OF FIDUCIARY DUTIES, OTHERWISE THERE CAN BE NO ATTORNEY'S FEES. I THINK ATTORNEY'S FEES CAN BE STRICKEN EVEN IF THE AMENDED BILL SURVIVES.

THE LAST POINT IS IF THE COURT DOES OVERRULE DEMURRERS AND PLEA[illegible] WE WOULD

ASK FOR JANUARY 15TH, 1999 (SIC) TO FILE THE ANSWER AND TO FILE DISCOVERY THAT WE PROMISED BECAUSE THE UNIVERSITY IS CLOSED FOR TWO WEEKS AROUND CHRISTMAS AND I WON'T HAVE THE ASSISTANCE OF THE UNIVERSITY DURING THAT PERIOD.

THE COURT: ALL RIGHT, THANK YOU, MR. RAB.

MR. RAB: I MEANT THE YEAR 2000.

THE COURT: ALL RIGHT, MR. MCGEEHAN, IS THERE ANYTHING ELSE THAT YOU WANT TO SAY?

MR. MCGEEHAN: JUST BRIEFLY, YOUR HONOR. TWO POINTS. ONE, WE DID NOT ANSWER THE PART ABOUT–MAYBE I MISUNDERSTOOD YOUR QUESTION ABOUT ATTORNEY'S FEES. I THOUGHT YOU MEANT WITH REGARD TO THIS MOTION–

[57] THE COURT: OH, NO, I MEANT AS IT RELATES TO YOUR UNDERLYING CLAIM.

MR. MCGEEHAN: WE DIDN'T ANSWER THAT AND WE CONCEDE THAT POINT.

THE COURT: OKAY.

MR. MCGEEHAN: TWO IS I DRAW THE COURT'S ATTENTION TO THE PLAINTIFF'S REBUTTAL MEMORANDUM WHICH WAS FILED ON AUGUST 17TH, PAGES FIVE–PAGE FIVE. WHAT WE DIDN'T–THERE'S TWO POINTS THAT ARE MADE IN THE SECOND FULL PARAGRAPH ON THAT AND THAT IS–

THE COURT: WAIT A SECOND, LET ME MAKE SURE I HAVE THAT.

MR. MCGEEHAN: YES, THE *DOUGALL* CASE, YOUR HONOR.

MR. RAB: PAGE FIVE OF NINE?

MR. MCGEEHAN: FIVE OF NINE.

THE COURT: DO WE HAVE THE REBUTTAL MEMORANDUM? I CAN'T PUT MY FINGER ON IT.

MR. MCGEEHAN: WOULD YOU LIKE TO LOOK AT MY COPY–

THE COURT: YES, DO YOU HAVE A COPY THERE HANDY?

[58] MR. MCGEEHAN: YES. MAY I APPROACH?

THE COURT: YES.

(THEREUPON, COUNSEL DELIVERED THE DOCUMENT TO THE BENCH.)

THE COURT: THANK YOU.

MR. MCGEEHAN: THE POINT MADE IN THAT SECOND FULL PARAGRAPH, IT IS UNDER TITLE TWENTY-THREE OF THE CODE, IT SAYS BOARD VISITORS MAY EMPLOY PEOPLE SUCH AS THE PLAINTIFFS IN THIS CASE UNDER SUCH TERMS AS THEY DETERMINE AS LONG AS THEY ARE NOT INCONSISTENT WITH STATE POLICY, WHICH INDICATES THE ABILITY TO ACTIVELY, IF YOU WILL, ENTER INTO THESE CONTRACTS.

TWO IS IN THE BOTTOM PART WE ARGUE THAT THE ISSUE THAT MR. RAB HAD ARGUED ABOUT WHETHER OR NOT THEY ARE PAID FOR THIS OUTSIDE EMPLOYMENT IS CONSISTENT WITH DPT POLICY. SO THE ISSUE IS–IS THE BURDEN FALLS ON US TO SHOW IN FACT IT IS AN ELEMENT OF THE CONTRACT. IF WE FAIL TO DO SO, WE WON'T RECOVER FOR THAT. IF WE PREVAIL ON DOING SO, BECAUSE WE HAVE ALLEGED IT IS PART OF THE CONTRACT, THEN WE OUGHT TO RECOVER FOR THAT. I HAVE NO FURTHER SUR-REBUTTAL.

THE COURT: ALL RIGHT. THANK YOU, MR. MCGEEHAN. LET ME RETURN THAT TO YOU.

[59] (THEREUPON, COUNSEL RETRIEVED THE DOCUMENT FROM THE BENCH.)

(PAUSE.)

THE COURT: WELL, I'M GOING TO TAKE A SHORT RECESS AND THEN I'LL COME BACK AND EITHER GIVE YOU MY DECISION OR TELL YOU I'M NOT GOING TO GIVE YOU MY DECISION.

(BRIEF BREAK.)

THE COURT: ALL RIGHT, COUNSEL, I AM GOING TO RULE IN THE CASE TODAY. I AM PREPARED TO RULE.

NOW, I'M GOING TO RULE IN THE SAME ORDER IN WHICH THE GROUNDS HAVE BEEN RAISED IN THE DEFENDANT'S DEMURRER AND I'M LOOKING AT THE DEMURRER THAT'S BEEN FILED IN THE *AMBER FOSTER* CASE.

MR. RAB, DID YOU FILE THE SAME PLEADING IN EACH OF THE FOUR CASES?

MR. RAB: YES, THE ONLY THING I DID WAS CHANGE THE PLURAL TO SINGULAR IN THE ONE CASE WHERE THERE WAS ONLY ONE PLAINTIFF.

THE COURT: OKAY.

MR. RAB: I MAY HAVE CHALLENGED JOINDER IN THE CASE WHERE THERE WAS ONLY ONE PLAINTIFF.

THE COURT: ALL RIGHT, I DIDN'T SEE THAT IN THE [60] DEMURRER THAT I WAS LOOKING AT THAT, BUT I WILL ADDRESS THAT TODAY.

ALL RIGHT, I'M GOING TO GO IN THE SAME ORDER THAT THE GROUNDS WERE PRESENTED IN THE DEMURRER IN THE *FOSTER* CASE.

AND MY RULING TODAY IS GOING TO BE DISPOSITIVE, BUT I'LL RULE ON ALL OF THE

GROUNDS ANYWAY, SO YOU'LL HAVE THE RULING.

ALL RIGHT, THE FIRST PARAGRAPH REGARDING THE PRESENTATION OF THE CLAIM TO THE CONTROLLER. THAT GROUND OF DEMURRER IS OVERRULED.

THE SECOND GROUND REGARDING THE VIRGINIA PERSONNEL ACT BEING THE EXCLUSIVE REMEDY, THAT GROUND OF DEMURRER IS SUSTAINED.

THE THIRD PARAGRAPH REGARDING THE STATEMENT OF A CAUSE OF ACTION FOR BREACH OF CONTRACT, THAT GROUND OF DEMURRER IS OVERRULED.

THE FOURTH PARAGRAPH REGARDING SPECIFICITY OF THE TERMS OF THE CONTRACT, THAT GROUND OF DEMURRER IS OVERRULED.

THE PLEA IN BAR, PARAGRAPH FIVE, REGARDING THE IMMUNITY OF THE COMMONWEALTH, THE PLEA IS OVERRULED BECAUSE THE COMMONWEALTH IS NOT IMMUNE FROM SUIT IN [61] CONTRACT, BUT TO THE EXTENT THAT I'VE RULED THAT THE VIRGINIA PERSONNEL ACT IS THE EXCLUSIVE REMEDY, THE PLEA IS SUSTAINED BECAUSE I CONCLUDE THAT THE PLAINTIFF SIMPLY DOES NOT HAVE A CONTRACT ACTION IN THIS CASE.

PARAGRAPH SIX REGARDING THE STATUTE OF FRAUDS, THAT ASSERTION HAS BEEN WITHDRAWN OR AT LEAST DELAYED UNTIL THE TIME OF TRIAL, IF ONE IS EVER HAD IN THIS CASE.

PARAGRAPH SEVEN REGARDING AN ILLEGAL COLLECTIVE BARGAINING CONTRACT, THAT PLEA IS OVERRULED.

NOW WITH RESPECT TO COUNT TWO, PARAGRAPH ONE OF THE DEMURRER IS OVERRULED. PARAGRAPH TWO OF THE DEMURRER IS SUSTAINED. PARAGRAPH THREE OF THE DEMURRER IS OVERRULED. PARAGRAPH FOUR REGARDING THE IMMUNITY OF THE COMMONWEALTH, IT'S THE SAME RULING. PARAGRAPH FIVE REGARDING THE STATUTE OF FRAUDS, THE SAME RULING. PARAGRAPH SIX REGARDING THE ILLEGALITY OF THE CONTRACT, THAT PLEA IS OVERRULED.

LET ME ALSO DEAL WITH THE MOTION TO STRIKE JUST SO THE RULING IS COMPLETE. THE MOTION TO STRIKE WITH RESPECT TO PARAGRAPH ONE IS DENIED TO THE EXTENT THE FACTUAL ALLEGATIONS ARE CONTAINED IN PARAGRAPH NINE, ELEVEN, TWELVE, THIRTEEN AND FIFTEEN RELATE TO THE CLAIM, I'M NOT GOING TO STRIKE THEM. THE PLAINTIFF, HOWEVER, [62] UNDERSTANDS HOW IT'S LIMITED IN ITS ABILITY TO RECOVER.

THE MOTION TO STRIKE THE REQUEST FOR ATTORNEY'S FEES IN PARAGRAPH TWO IS SUSTAINED. THE MOTION TO STRIKE IN PARAGRAPH THREE REGARDING, I GUESS THIS IS YOUR AD DAMNUM COMPLAINT, THAT'S OVERRULED, TO THE EXTENT THE PLAINTIFFS CAN SHOW DAMAGES, THEY CAN SPECIFY THOSE IN THE COURSE OF DISCOVERY.

AND THE CLAIM WITH RESPECT TO MISJOINDER IS OVERRULED WITHOUT PREJUDICE. I THINK THE PARTIES WERE PROPERLY JOINED AT THE TIME THE SUIT WAS FILED. FOR THE SAKE OF JUDICIAL ECONOMY I'M NOT GOING TO MISJOIN THEM AT THIS POINT. AND IT MAY

BE THAT THEY DON'T HAVE TO BE MISJOINED AT ANY POINT, BUT CERTAINLY THE DEFENDANT IS FREE TO RAISE THE ISSUE AGAIN IF— IF THE CASES PROCEED TO TRIAL.

NOW, LET ME SAY A COUPLE OF THINGS ABOUT MY DISPOSITIVE RULING TODAY, AND THAT IS THAT I'VE CONCLUDED THE VIRGINIA PERSONNEL ACT IS THE EXCLUSIVE REMEDY FOR THESE PLAINTIFFS. I THINK THERE ARE WAYS IN WHICH THESE QUESTIONS CAN PROPERLY BE PLACED BEFORE THE COURT. ONE IS A REVIEW OF THE ISSUE OF GRIEVABILITY. ANOTHER MAY BE AN ALLEGATION OF THE CONSTITUTIONAL DEPRIVATION. HOWEVER, THAT IS NOT THE STATUS OF THIS CASE, AT LEAST [63] NOT TODAY.

THE VIRGINIA PERSONNEL ACT I CONCLUDE DOES ABROGATE WHATEVER COMMON LAW RIGHT TO SUE ON A CONTRACT THAT A STATE EMPLOYEE MAY HAVE EVER HAD, IF THERE EVER WAS ONE. SO THE PLAINTIFFS ARE GOING TO HAVE TO FIND SOME OTHER WAY TO GET INTO COURT OR ARE GOING TO HAVE TO ALLEGE SOME OTHER GROUND.

SO TO THE EXTENT I HAVE SUSTAINED THAT DEMURRER, MR. MCGEEHAN, YOU MAY HAVE LEAVE TO AMEND, IF YOU WANT LEAVE TO AMEND. I DON'T KNOW WHAT YOUR THOUGHT IS ABOUT IT, BUT WHY DON'T I LEAVE IT THIS WAY. THE PLAINTIFF MAY HAVE TWENTY-ONE DAYS WITHIN WHICH TO AMEND. THE FAILURE OF THE PLAINTIFF TO AMEND WITHIN TWENTY-ONE DAYS WOULD MEAN THAT THE SUIT WOULD BE DISMISSED WITH PREJUDICE.

MR. MCGEEHAN: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT–

MR. RAB: HOW DO YOU WANT US TO PREPARE THIS? CAN WE WAIT FOR THE REPORTER?

THE COURT: WELL, I WOULD LIKE TO ENTER AN ORDER TODAY. YOU CAN CERTAINLY SUPPLEMENT THE ORDER WITH A COPY OF THE TRANSCRIPT, IF YOU'D LIKE TO DO THAT, BUT I DO WANT TO ENTER AN ORDER IN EACH CASE TODAY SO THAT THE [64] FILE IS COMPLETE.

MR. RAB: I'LL USE THE SKETCH ORDER, AND I'LL PUT THE FOUR NUMBERS ON IT AND, OF COURSE, IT COULD BE–

THE COURT: I'LL NEED ONE FOR EACH FILE UNFORTUNATELY–

MR. RAB: ONE FOR EACH–

THE COURT: –SO–BUT WE HAVE PLENTY OF FORMS HERE. THE DEPUTY CAN HAND THEM TO YOU AND I'LL ASK YOU TO PLEASE FILL IT OUT LEGIBLY AND IN BLACK INK.

MR. RAB: OKAY.

THE COURT: ALL RIGHT, DOES THAT–DOES THAT RESOLVE THE MATTERS BEFORE THE COURT TODAY?

MR. RAB: YES.

MR. MCGEEHAN: YES, YOUR HONOR.

THE COURT: ALL RIGHT, THANK YOU ALL FOR APPEARING. WE'LL BE IN RECESS.

(THEREUPON AT 11:40 A.M., THE HEARING IN THE ABOVE-ENTITLED MATTER WAS CONCLUDED.)

CERTIFICATE OF REPORTER

I, SANDRA J. LANG, DO HEREBY CERTIFY THAT I TOOK THE AUDIOGRAPHIC NOTES OF THE FOREGOING PROCEEDINGS AND THE SAME WERE REDUCED TO TYPEWRITING UNDER MY DIRECTION; THAT THE FOREGOING IS A TRUE RECORD OF SAID PROCEEDINGS; THAT I AM NEITHER RELATED TO NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION HEREIN; AND, FURTHER, THAT I AM NOT A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL OR EMPLOYED BY THE PARTIES THERETO, NOR FINANCIALLY OR OTHERWISE INTERESTED IN THE ACTION.

/s/ Sandra J. Lang